

CASES
ARGUED AND DETERMINED
BY THE
SUPREME COURT

OF

The State of Missouri

AT THE

APRIL TERM, 1883.

(Continued from Volume 77.)

THE FIRST NATIONAL BANK OF BURLINGTON, *Plaintiff in Error*, v. HATCH.

1. **Bill of Exchange: PRESENTMENT FOR ACCEPTANCE: PLEADING.** The petition in an action by the indorsee against an indorser of a bill of exchange alleged that the bill was presented to the drawee "for acceptance, and was by him then and there declined and refused acceptance, and not accepted." *Held*, that this was a sufficient averment of a demand of acceptance.
2. — : — . To make a valid presentment of a bill of exchange

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for acceptance, it is not necessary that the notary should actually produce the bill; it is sufficient if he has it with him ready to produce in case the drawee calls for it.

3. —— : NOTARY'S CERTIFICATE. The certificate of a notary under seal, under the law merchant, was evidence of presentment, refusal and protest; and it is so recognized by our statute, (Wag. Stat., 218, § 20). When it also recites notice of dishonor to the parties, the statute makes it evidence of notice as well as of dishonor, provided it is verified. Wag. Stat., p. 598, § 50.
4. —— . Notice of dishonor need not be in writing, and is not necessarily given by a notary. The holder of the paper may give it. No particular form of words is necessary.
5. —— : PLEADING AND PROOF. When the plaintiff in his petition alleges presentment and notice of dishonor, he cannot prove waiver of such conditions in the absence of proper averments of a waiver.
6. —— : NOTICE. Where the indorsers are successive and not co-sureties, proper notice to any one of them is sufficient to hold him.

*Error to Livingston Circuit Court.—Hon. E. J. BROADDUS,
Judge.*

REVERSED.

Shanklin, Low & McDougal for plaintiff in error.

The notice of presentment and protest was sufficient. It was not necessary that the notice should be in writing. Story on Bills of Exchange, (3 Ed.) p. 367, § 300; 2 Daniel Negotiable Inst., (2 Ed.) p. 30, § 972; *Glasgow v. Pratte*, 8 Mo. 336; *Linville v. Welch*, 29 Mo. 203. After the bill was presented and protested for non-acceptance, the promise of defendant to pay it, with a knowledge of all the facts, such promise to pay is a waiver of all informalities as to giving notice. Story on Bills, (2 Ed.) p. 332, §§ 280, 320, 373; 2 Daniel Neg. Inst., § 1147; *Harness v. Daviess Co. Savings Ass'n*, 46 Mo. 357; *Salisbury v. Renick*, 44 Mo. 554; *Clayton v. Phipps*, 14 Mo. 399; *Dorsey v. Watson*, 14 Mo. 59; *Wilson v. Huston*, 13 Mo. 146; *Mense v. Osborn*, 5 Mo. 544; *Sigerson v. Mathews*, 20 How. 498; *Thornton v. Wynn*, 12

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Wheat. 184; *Reynolds v. Douglass*, 12 Pet. 497; *Faulkner v. Faulkner*, 73 Mo. 327.

W. C. Samuel and *George W. Warder* for defendant in error.

Allegation of demand for acceptance and certificate of presentment for acceptance insufficient. Daniel Neg. Inst., §§ 462, 654, 950, 953; Edwards Bills, (2 Ed.) top p. 477; *Musson v. Lake*, 4 How. 262; *Smith v. Gibbs*, 10 Miss. (2 Sm. & Mar.) 479; *Fall River Bank v. Willard*, 5 Met. 216; *Mitchell v. DeGrand*, 1 Mason (U. S. C. C.) 176; *Price v. McClare*, 3 Abb. Pr. 253; *Robinson v. Johnson*, 1 Mo. 435; *Draper v. Clemens*, 4 Mo. 52; *Nace v. Richardson*, 36 Mo. 133; Chitty on Bills, 260 note; Ib., 402. The drawee cannot waive due diligence in presentment. *Pierce v. Whiting*, 29 Me. 188; *Ex parte Bigold*, 2 Mont. & A. 633; *Lee Bank v. Spencer*, 6 Met. 308; Dan. Neg. Inst., § 1109; *May v. Boisseau*, 8 Leigh 164; *Posey v. Decatur Bank*, 12 Ala. 815. Evidence of waiver of notice must be pleaded. *Lambert v. Palmer*, 29 Iowa 104; *Cole v. Wintercost*, 12 Texas 118; *Garvey v. Fowler*, 2 Sand. 665; *Shultz v. Dupuy*, 3 Abb. Pr. 252; *Pier v. Heinrichoffen*, 52 Mo. 333; *Hall v. Davis*, 41 Ga. 614; *Burgh v. Legge*, 5 Mees. & W. 418; Edwards Bills, *636. Promise to pay must be made after full knowledge of the facts showing him not legally bound to pay. *Dorsey v. Watson*, 14 Mo. 59; *Clayton v. Phipps*, 14 Mo. 399; *Salisbury v. Renick*, 44 Mo. 554; *Arnold v. Dresser*, 90 Mass. (8 Allen) 436; *Low v. Howard*, 11 Cush. 268; *Kelley v. Brown*, 5 Gray 108; *Ballin v. Betcke*, 11 Iowa 204; *Ault v. Sloan*, 4 Iowa 504; 2 Greenleaf Ev., (Red. Ed.) § 190, and cases cited, n. 1; *Bank v. Baldwin*, 17 N. J. L. 487; *Edwards v. Tandy*, 36 N. H. 540; *Freeman v. O'Brien*, 38 Iowa 406; *Lilly v. Petteway*, 73 N. C. 358; *Campbell v. Barney*, 11 Iowa 43; *Trimble v. Thorn*, 16 Johns. 152. Promise must be explicit and unequivocal. *Tardy v. Boyd*, 26 Gratt. 631; *Allen v. Harrah*, 30 Iowa 363; *Creamer v. Perry*, 17 Pick. 332; *Thornton v. Wynn*, 12 Wheat. 183; Story on

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Bills, § 321. Notice of dishonor should be sent on the day after protest. 1 Parsons Notes and Bills, 511, note 1; 3 Kent, (12 Ed.) 106, note d; *Bank v. Orris*, 40 Iowa 332; *Grant v. Strutzel*, 6 N. W. Rep. 119; *Griffith v. Assmann*, 48 Mo. 66; *Bank v. Taylor*, 34 N. Y. 128, and cases cited. Want of funds by drawee does not excuse presentment as against the indorser. *Ramdulollday v. Darieux*, 4 Wash. C. C. 61; *Ralston v. Bullits*, 3 Bibb 261; *Scarborough v. Harris*, 1 Bay 178. Notice must come from one entitled to demand payment. Parsons Neg. Inst., §§ 972, 1083; *Juniata Bank v. Hale*, 16 S. & R. 157; *Magruder v. Union Bank*, 3 Pet. (U. S.) 87; *Staunton v. Blossom*, 14 Mass. 116.

MARTIN, C.—The plaintiff brought suit on the 14th day of September, 1878, against the defendant as the indorser of a foreign bill of exchange drawn on the 25th day of May, 1873, by the Burlington & Southwestern Railway Company on Elijah Smith, the financial agent of the company at Boston, payable, in the sum of \$5,000, forty days after date. The bill was indorsed by the defendant to the plaintiff, for the sum of \$5,000, which was paid at the time of the indorsement and delivery to plaintiff. The petition is in the usual form describing the making, indorsement and delivery of the bill before maturity. The petition contains the averment that "said bill of exchange was subsequently, on the 30th day of May, 1873, presented to the said Elijah Smith at his office in the Sears building in Boston, Massachusetts, for acceptance, and was by him then and there declined and refused acceptance and not accepted, and said bill of exchange was, on that day, duly protested for non-acceptance, of all which said defendant Henry Hatch had due notice." The answer consisted of a general denial. The case was tried by the court without a jury.

The plaintiff submitted in evidence the bill of exchange and the indorsements thereon, and the certificate of the notary relating to the dishonor of the paper and notice of

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that fact to the defendant. The certificate of the notary in Boston under his hand and seal, was as follows: "On this 30th day of May, in the year of our Lord, 1873, I, Albert W. Adams, notary public, duly commissioned and sworn, in and for the county of Suffolk, and practicing in the city of Boston, at the request of C. F. Smith, Esq., cashier of the Continental National Bank of Boston, went with the original bill, a copy of which is hereto annexed, within the time therein limited, and demanded acceptance thereof of the drawee, at his office in Sears building, and he answered, 'I decline accepting.' The bill remaining unpaid, I duly and officially notified the last indorser by a written notice sent him by mail to First National Bank, Burlington, Iowa, enclosing like notices to each of the other parties to said bill, (postage prepaid) in each of said notices requiring payment. Wherefore, I, the said notary, by request as aforesaid, have protested, and by these presents do solemnly protest against the drawer of said bill, and all others concerned therein, for exchange, re-exchange and all costs, charges, damages and interest suffered and sustained, or to be suffered and sustained by reason or in consequence of non-payment thereof."

The record recites that this certificate was, on objection of defendant, excluded as evidence of notice of protest, but was read as evidence of protest for non-acceptance.

Lyman Cook, president of plaintiff, testified among other things, that defendant was at the bank two or three times a week; that he kept his account there, and witness talked with him about the draft; that immediately after the protest witness went down to defendant's office and payment was promised, and defendant admitted his liability.

Q. What protest was it you notified Mr. Hatch and the rest of the indorsers of? A. When the notary first protested the draft. I don't know as it was protested but once. I think there was but one protest about it. I forget whether it was at sight or not. I notified them of the first protest that came.

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Q. How soon after you received the notice of the protest for non-acceptance did you have a talk with Mr. Hatch ?
A. I couldn't say now, but I think the same day ; that is my impression ; that I saw him the same day that we got the notice. I didn't take the notice down to him, but saw him and said to him the draft was protested ; and I think they knew it before I got there. It was my impression they had a notice with them.

Mr. Lauman testified to conversations with defendant tending to establish an acknowledgment of his liability after the protest.

The defendant was called by the plaintiff, and testified : "I don't know that I ever received any notice of the dishonor of this draft. I do not remember now whether I did or not, and can't say." He testified that he was in the plaintiff's bank nearly every day and talked with the president and cashier about the draft. He continues : "I cannot say that they notified me that it had been protested for non-acceptance ; but they talked with me about it, and we knew it had not been accepted, and Smith would not pay it. They might have told me it had been presented and not accepted, and protested, about the time it occurred, but I do not now remember. I should not think it strange if I did receive notice of protest for non-acceptance, because I received so many notices of failure to accept about the time of Smith's failure, but can't say positively as to this bill." Again, "Mr. Elijah Smith having failed, notices of protest rained all around." He testified that he expected the draft would be paid when it was drawn and indorsed, but that he knew it would be dishonored before it was protested ; that he had heard of Smith's failure, and that Smith had telegraphed him that he would accept no more bills.

The defendant offered no evidence. The case was submitted and taken under advisement, the plaintiff having asked the court to give the following declarations of law :

1. If the court, sitting as a jury, believes from the evidence that Henry Hatch, the defendant, indorsed the

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draft in suit, and that the same was presented by the holder thereof for acceptance, and that acceptance was refused, and that it was duly protested for non-acceptance, and that notice of such presentment and protest thereof was given to said Hatch by plaintiff or the president or cashier thereof within a reasonable time thereafter, the court must find for the plaintiff.

2. To fix the liability of defendant, it is not absolutely necessary that he should have written notice of the presentment and protest of the draft in suit. It is sufficient if he has had verbal notice thereof from plaintiff or its officers; therefore, if the court finds from the evidence that defendant had verbal notice from the plaintiff or its officer, within a reasonable time after the presentment and protest of said draft for non-acceptance, the court sitting as a jury ought to find for the plaintiff.

3. If the defendant had either written or verbal notice of the presentment and protest of the draft in suit for non-acceptance, the finding ought to be for the plaintiff.

4. If defendant acknowledged his liability to plaintiff after the presentment and protest of said draft, such acknowledgment of liability is a waiver of notice of protest for non-acceptance.

5. The possession of the draft by plaintiff is *prima facie* evidence that plaintiff is the holder for value and the owner thereof.

These declarations were all refused by the court, and judgment was rendered for the defendant, who asked no instructions. The grounds upon which the court was persuaded to render this judgment may reasonably be presumed to be the same which are submitted to us by the defendant for the purpose of sustaining it, and which I will now briefly consider.

I. It is contended by defendant that the petition fails to contain any averment of demand of acceptance of the draft, and that consequently no proof of such fact can be noticed by the court in deciding the issues before it. I

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think the learned counsel for the defendant are mistaken in their construction of the petition. The averment that the bill of exchange "was presented to the said Elijah Smith at his office in the Sears building in Boston, Massachusetts, for acceptance, and was by him then and there declined and refused acceptance, and not accepted," contain, under every fair intendment, the necessary and material implication that acceptance was requested, when presentment was made. How could it be presented for acceptance to the drawee without conveying to him the necessary information that acceptance was wanted and requested at the time of the presentment; and how could he decline and refuse acceptance at that time, if the presentment for acceptance did not in fact convey to him the wish and request to do the thing he declined and refused to do? The term "demand" is not as appropriate in its application to the presentment of a bill for acceptance as it is when presented for payment after acceptance. The drawee not having accepted, is under no obligations whatever to the holder of the paper. The attitude which the holder bears to a drawee who has not accepted, hardly justifies the use of the term "demand," and in pleading other averments are more commonly used such as "request," which implies perhaps the same thing, but with a courtesy more in accord with the attitude of the holder.

The allegations in this petition are in strict conformity with the forms which have been in use in England for about fifty years, having been adopted by rule of court. In the first American edition of Mr. Chitty's work on Bills, published in 1834, his form of a declaration by an indorsee against the indorser of a bill of exchange for non-acceptance, after reciting the execution, indorsement and delivery of the bill to plaintiff, continued as follows: "And the same was then and there presented to the said G. H. for acceptance, and the said G. H. then and there refused to accept the same, of all which the defendant then and there had due notice." Chitty on Bills, (1 Am. Ed.) 82; Chitty on

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Bills, (12 Am. Ed.) 626. I will remark in passing, that this form of Chitty's, used by the plaintiff in this case, is identical with the form which will be found included in our statutes from 1855 down to the present time. 2 R. S. 1855, p. 1618; Gen. St. 1865, pp. 921, 922; 1 R. S. 1879, p. 702. It is perhaps unnecessary to allude to this for the purpose of adding anything to the worth and accuracy of Chitty's forms; while I must be pardoned for maintaining that the fact of the adoption and approval by our revisers for nearly thirty years, certainly ought not to detract from the value of the forms furnished by that distinguished pleader.

The cases cited by the counsel for defendant in support of their position do not relate to the sufficiency of pleadings, but to the sufficiency and fullness of proofs—another subject entirely.

II. The conclusion we have reached about the sufficiency of the pleading in respect of demand for acceptance, disposes of the objection of defendant to a want of proof on this point. The objection is not that there was no recital of demand in the certificate, but that in legal contemplation, there was no proof in the case, because there was no allegation of demand in the petition.

III. The notarial certificate recites that the notary "went with the original bill * * and demanded acceptance thereof of the drawee, * * and he answered, 'I decline accepting.'" The counsel for defendant, in a brief of great learning and ability, contend that this notarial certificate is defective in failing to state that the bill was exhibited or produced when acceptance was requested. I do not propose to review the many authorities submitted by them in support of this proposition. I have examined them, and will state the reasons why I cannot regard them as impeaching the validity of the certificate. 1st, Nearly all of them relate to presentment for payment and not for acceptance. "The duty of a holder in presenting a draft for acceptance manifestly is not governed by rules or rather circumstances so urgent as those that attend the presentment

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and demand for payment." 2 Edwards Bills and Notes, (3 Ed.) § 693; Story on Bills, (4 Ed.) § 350. 2nd, In none of the cases pressed upon our attention does it appear affirmatively or expressly in the certificate or proofs, that the presenting party had the bill in his possession at the time he demanded payment or acceptance. A statement of such a material fact must necessarily give a more significant meaning to the recitals of what he did when he repaired to the drawee with the bill, of which he says he then and there demanded acceptance. 3rd, The fact that he had the bill in his actual possession implies that he was prepared to discharge in the presence of the drawee all the strict formalities of presentment and demand. He was able to leave it with the drawee for inspection if he so requested, or expressed any doubts as to its genuineness. Under these circumstances there could be nothing fictitious in his demand and presentment, and the law does not require a physical exhibition of the bill, if the drawee, well knowing the character of the bill, refuses to accept and does not ask to see the bill. Edwards says: "The person presenting the bill for acceptance should have it in his actual possession, and should exhibit it to the drawee with a request for its acceptance; but this is not absolutely necessary; if the drawee does not ask the production of the bill and refuses to accept, the drawers and indorsers may be charged by protest and notice in the same manner as if the refusal had been made after actual sight." 1 Edwards Bills and Notes, (3 Ed.) § 558; 2 Daniel Neg. Inst., § 462; *Fisher v. Beckwith*, 19 Vt. 31; *Bank of Virginia v. Cameron*, 7 Barb. 143. A presentment in this manner is good as a presentment, and it is not regarded as a waiver of presentment.

IV. The certificate of the notary, being under seal, was evidence of presentment, refusal and protest. Such was its import under the law merchant, and it is so recognized in this state by statutory enactment. 2 Wag. Stat. 1872, p. 218. When the certificate also recites notice of dishonor to the parties, it is evidence of that fact as well as the fact of

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dishonor, when verified by the notary. 2 Wag. Stat. 1872, p. 598. In this case the certificate not being verified, was not evidence of notice of dishonor, and the court was right in ruling it as insufficient for that purpose.

V. Notice of dishonor is not required to be in writing. *Linville v. Welch*, 29 Mo. 203. Neither does it, under the law merchant, belong exclusively to the duties of the notary. The owner or holder of the paper is the proper person to give it.

The court erred in refusing the first, second and fifth declarations of law asked by plaintiff. They are correct, and there was abundance of evidence to justify and support a finding for plaintiff on the issue of notice had by defendant of the dishonor of the draft. The president of the bank testified that he notified the indorsers of the first protest that came; that he told the defendant the same day the notice came, that the draft was protested. This is repeated in his testimony. This communication must have been made immediately after the protest. The defendant's admission to the effect that "they might have told me it had been presented and not accepted and protested, about the time it occurred, but I do not now remember," goes strongly to support the receipt of notice, especially when taken in connection with his admission of liability. Again he says, "I should not think it strange if I did receive notice of protest for non-acceptance." I think the evidence is pretty convincing that when the shower of notices took place on the failure of the drawee, one of them must have fallen on the defendant; also that he received verbal notice from the president and cashier of the plaintiff.

No particular form of words is necessary in the notice. A notice to the indorser that the bill has been protested for non-acceptance is sufficient. This implies dishonor. *Mills v. Bank U. S.*, 11 Wheat. 431. Notice of "protest" of a bill of exchange in common acceptance implies presentment and dishonor. 2 Daniel Neg. Inst., § 983; 2 Edwards Bills and Notes, (3 Ed.) § 806.

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VI. The instruction of plaintiff relating to a waiver of presentment and notice of dishonor, was properly refused. When the plaintiff, in his petition, alleges presentment and notice of dishonor, he is not permitted, under our Practice Act, to prove that the defendant waived such conditions, in the absence of proper averments of a waiver. *Pier v. Heinrichoffen*, 52 Mo. 333; 2 Edwards Bills and Notes, (3 Ed.) § 949.

The position of the indorsers on this bill indicates that they were successive and not co-sureties. A proper notice, therefore, to any one of them, is sufficient to hold him. *Stix v. Mathews*, 63 Mo. 371.

For the reasons I have given the judgment of the circuit court is reversed and the case is remanded for re-trial. PHILIPS, C., concurs; WINSLOW, C., absent.

MAUPIN v. THE VIRGINIA LEAD MINING COMPANY, Plaintiff
in Error.

1. **Corporations: EMPLOYMENT OF ATTORNEY BY SUBORDINATE OFFICERS.** A corporation is not liable for the value of services performed for it by an attorney at law by reason, merely, of his employment by a subordinate officer or agent, to whom no delegation of authority to employ an attorney is shown.
2. **Practice: INSTRUCTION.** Evidence tending to support a valid defense furnishes a sufficient basis for an instruction applicable to such defense.
3. **In Attachment Suits**, judgments should be general, where the defendant appears and defends. A judgment in favor of the plaintiff in such a suit, to be satisfied by sale of the property attached at the commencement of the action, where the defendant appeared and defended; *Held*, to be erroneous; the judgment, if plaintiff were entitled to any, should have been general.

Error to Gasconade Circuit Court.—Hon. A. J. SEAY, Judge.

REVERSED.

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This was a suit by attachment upon an account for services rendered by the plaintiff, as attorney at law, and expenditures made by him in connection with such services. The instruction asked by the defendant and refused by the court, and commented upon in the opinion, was as follows: "If the jury believe from the evidence that the plaintiff rendered the services and paid the expense claimed by him, in consideration that F. A. and N. Sands should endeavor to sell certain mining properties of plaintiff and one Locke in London, and that said Sands faithfully endeavored to sell said mining properties, then the plaintiff has been fully paid, and the verdict will be for the defendant." There was a verdict and judgment for the plaintiff in the amount claimed "and that the property and real estate attached at the commencement of this suit * * be sold to satisfy and discharge the judgment rendered, and that a special execution issue herein."

Chas. A. Winslow for plaintiff in error.

L. F. Parker and Smith & Krauthoff for defendant in error.

On Rehearing.

SHERWOOD, J.—A glance at this voluminous mass of ill-assorted papers, called by the courtesy a record, shows this cause, though tried in Gaseonade, originated in Franklin county. Objections which were thought to exist, and which, if valid, would well have warranted a reversal of the judgment, under a more careful examination of the record, have disappeared. Our attention will, therefore, be directed to the merits of the cause in order to discover if any error, materially affecting the merits of the action, occurred during the progress of the trial.

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I.

The instruction given on behalf of the plaintiff, was in these words: "The court instructs the jury that if they find from the evidence that the plaintiff performed the services set out in the account sued upon, or any part of the same, for the defendant, at the instance of its officers and agents, then they will find for the plaintiff in such sum as those of the services, as were so rendered, were reasonably worth, not to exceed \$3,663.35, with interest from January 3rd, 1877, at six per cent." Under the rulings of this court, the managing and other head officers of a corporation, without a formal resolution of the board to that effect, can employ counsel to prosecute or defend suits for the corporation. *Western Bank of Mo. v. Gilstrap*, 45 Mo. 419; *Turner v. Railroad Co.*, 61 Mo. 501; *Southgate v. Railroad Co.*, 61 Mo. 89; *Thompson v. School Dist.*, 71 Mo. 495. But this court, and we presume no other court, has ever gone so far as to hold that any officer or agent of a corporation, however humble his station and limited his powers, without any delegation of authority to that effect, could bind the corporation with which he is connected by employing an attorney in behalf of such corporation. And yet this instruction goes to that extent, and is, of consequence, erroneous. Under it, no matter what the station of the officer or agent, no matter whether he had any authority to that effect or not, he could bind the corporation. Under such an instruction the authority of the officer or agent would necessarily be assumed, and so the jury must have understood it. Our views as to the propriety of this instruction find full support in the case of *Wells v. Railroad Co.*, 35 Mo. 164.

II.

Error was also committed in refusing the instruction asked on behalf of the defendant. The theory of the defense, as set up in the answer, was in substance that the services of the plaintiff were rendered in behalf of Francis

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A. and Nathan Sands, and outside of the corporate business in certain individual speculations, and were to be fully compensated by similar services on the part of Sands and Sands. There was a tendency in the evidence offered by plaintiff himself, to support this defense. It is not necessary to determine whether this evidence would outweigh other evidence offered by plaintiff; it is only necessary to say it furnished a basis for the instruction asked, and, therefore, that it should have been given, for, as it was, all that evidence, and the proper inferences deducible therefrom, were practically withdrawn from the consideration of the jury.

III.

Moreover, the judgment in this cause, the defendant appearing and defending the action, should have been a general one, conceding, of course, that the steps prior thereto were such as we could sanction. This alone would be sufficient ground for reversing the judgment regardless of other considerations. Therefore, judgment reversed and cause remanded. All concur.

MILTENBERGER et al., Appellants, v. MILTENBERGER.

1. **Wills: PROOF OF EXECUTION.** The evidence offered in support of a paper propounded as a will showed that it was written in a language not understood by the supposed testatrix; that the witnesses attested not at her request, but at the request of one of the legatees; and that she neither said nor did anything, nor was anything said or done in her presence, which indicated that she knew she was making a will. *Held*, that the execution of the paper as a will was not proven.
2. — : — : WITNESSES. A legatee whose interest as such in the establishment of a will still continues, will not be allowed to testify to its due execution, notwithstanding he may not have signed as an attesting witness. The statute only disqualifies him in express terms in the case in which he has so signed, but it would defeat the

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manifest policy of the statute to allow him to testify when he has not so signed.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Chas. E. Pearce and Hermann & Reyburn for appellants.

Overall & Judson for respondents.

HENRY, J.—This is an action under the statute to establish a certain paper as the last will of Theresa Miltenberger, which was rejected by the probate court. Plaintiffs allege that the will was executed by the deceased, August 22nd, 1873. She died leaving five children, and by the said will, except \$1 to each of the other children, bequeathed all her property to the plaintiffs Pauline and Elise. The answer denied that the paper in question was the last will of the deceased. A trial by jury was waived and the court found that the paper was the last will of the deceased, and, on appeal to the St. Louis court of appeals, the judgment was reversed, and plaintiffs have appealed to this court.

The subscribing witnesses to the paper, Barney Northoff and his wife Mary, were examined as witnesses for plaintiffs, ^{1. WILLS: PROOF OF EXECUTION.} and testified that the deceased was eighty years of age, understood the German and French languages, but was unable to read, write or speak English, in which latter language the will was written; that at the request of one of plaintiffs, they went to the house of the deceased to witness her will. Neither of the witnesses could testify to any declaration of the deceased, or any act on her part, except that of signing the paper, or any declaration in her presence and hearing indicating that she knew the contents of the paper, or that she signed it as her last will and testament. Mr. Northoff testified that he signed it first as attesting witness, and that deceased signed it after he and his wife had both subscribed their names as attesting

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witnesses. There is on this point a conflict between his testimony and that of his wife, who stated that when she went over, at the request of Elise, she saw the old lady in the kitchen, writing her name, and that she signed her name as attesting witness after her husband subscribed it, and saw no one sign it afterward. Neither of the attesting witnesses testified in relation to the sanity of the old lady, or her capacity to make a will.

So far there was not sufficient proof of the execution of the will by Theresa Miltenberger. It was written in a language she could not read, attested by witnesses not at her request, but at the request of one of the legatees. She said nor did anything, nor was anything said or done, in her presence, which indicated that she knew she was making a will.

Mr. Redfield in his work on Wills, says: "There can be no question that persons incapable of reading, whether from defect of sight, or want of instruction, or sickness, or other causes, require that instruments to be executed by them in the presence of witnesses, should be read over, in the presence of the witnesses and of the person executing them, in order to afford the fullest assurance of the execution being understandingly done." Vol. 1, p. 534. But he says that: "All that is requisite in such cases is, that the proper communication be made from the testator to the witness, so that they may be able to depose to the act being understandingly done." Ib. See also Williams on Ex., vol. 1, 312; Jarman on Wills, vol. 1, 64 and note 6.

Ordinarily when witnesses are called by one to attest a paper which he has signed, they need not know its contents or be able to testify that the party signing it comprehended it. If attesting witnesses testify that the party signing the paper requested them to attest it, this, in an ordinary case, would be *prima facie* evidence that he knew its nature, and comprehended its contents, but in case of a will, if such party be blind, or as in this case extremely old, and ignorant of the language in which the paper is written, there must be

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some evidence that she knew she was executing a last will and testament, especially so when by the will she disinherits three of her five children, none of whom are present at the preparation or execution of the will, except the two favored by it, who called in the attesting witnesses, and were the chief actors in the sickening scene.

Our statute requires that every will "shall be attested by two or more competent witnesses subscribing their names 2. — : — : witness to the will in the presence of the testator."

The proponents of the will introduced themselves as witnesses, and, over defendants' objections, were permitted to testify that Pauline said, in a loud distinct voice, speaking in the German language in the presence and hearing of her mother and the attesting witnesses, "This is my mother's will. She gives to my sister Elise and me all what she has, and she wants us to help Charley, if he should be in need of it," and that her mother said, "You will help Charley if he should be in need of it," and then signed the will. As all the persons present understood and conversed in the German language, if these legatees were competent witnesses to prove the facts testified to by them, the execution of the will was proved. Were they competent for that purpose?

Section 36, Wagner's Statutes, 1369, provides that: "If any person has attested, or shall attest the execution of any will, to whom any beneficial devise, legacy * * shall be given, such devise, legacy * * shall, so far only as concerns such person attesting the execution of such will, or any person claiming under him be void, and such person shall be admitted as a witness to the execution of such will." Section 38 provides that: "If the execution of such will be attested by a sufficient number of other competent witnesses, as required by this chapter, then such devise, legacy, etc., shall be valid." Section 40 is as follows: "If any person has attested, or shall attest the execution of any will, to whom any legacy or bequest is thereby given, and such person, before giving testimony concerning the

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execution of such will, shall have been paid, or have accepted or released, or shall refuse to accept such legacy or bequest upon tender thereof, such person shall be admitted as a witness to the execution of the will."

It was manifestly the object of these sections to exclude as witnesses to the formal execution of the will, devisees and legatees, while their interest as such should continue, and to provide, for proof of that fact, wholly disinterested witnesses. Legatees and devisees are not allowed to be attesting witnesses while their interest as such continues, and the policy of the law, as indicated in those sections, would be entirely frustrated if they should be permitted to prove the execution of the will because they had not signed it as attesting witnesses. It would be difficult to assign a reason why they should not testify to the execution of the will signed by them as attesting witnesses, and yet be admitted to testify to precisely the same facts if their names do not appear as attesting witnesses.

Section 1, Wagner's Statutes, 1872, which provides that "no person shall be disqualified as a witness in any civil suit or proceeding at law or in equity by reason of his interest in the event of the same as a party or otherwise," has never been construed as repealing sections 36, 38 and 40 of the act in relation to wills, or either of them. Both acts were retained in the revision of 1879, and must receive such a construction, as that both may stand, unless there is an irreconcilable conflict between them. No such conflict exists. The sections of the act in relation to wills, may be read as exceptions to section 1 of the act in relation to witnesses, and this admits legatees and devisees to testify in any issue in a case of contest, except that in relation to the formal execution of the will.

In *Garvin v. Williams*, 50 Mo. 213, the legatees were not called to prove or disprove the execution of the will, but testified only in relation to undue influence alleged to have been exercised by them over the testator to procure its execution. There was no controversy in relation to the

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formal execution of the will. So in *Gamache v. Gambs*, 52 Mo. 287, the execution of the will was proved and the legatee was offered as a witness, for what purpose the record does not disclose, and, on a general objection to his competency, was excluded. Those cases and what is herein announced are not in conflict.

The judgment of the court of appeals is affirmed.
All concur, except RAY, J., who dissents.

COMBS v. SMITH, *Receiver, Appellant.*

1. **Receiver: HIS LIABILITY FOR TORTS.** An action may be maintained against the receiver of a corporation for a tort committed by the corporation before his appointment. The judgment, if for the plaintiff, will be against him in his capacity as receiver, and is leviable out of the assets in his hands.
2. **Railroads: BENEFITS TO BE ALLOWED ON ASSESSMENT OF DAMAGES FOR RIGHT OF WAY.** The benefits for which a railroad company are entitled to be allowed in estimating the damages sustained by a land owner by reason of the appropriation of his land for the road, are such as the land derives from the location of the road through it, and are not enjoyed by other lands in the same neighborhood.
3. —— : CONDEMNATION OF RIGHT OF WAY: MISTAKE. In an action against a railroad company for unlawfully occupying the plaintiff's land, proof that the land was omitted by mistake from the report of the commissioners in a proceeding to condemn a right of way across this and other lands, and that the road was built over the land in controversy with the knowledge and approbation of plaintiff, is not equivalent to proof that the land was included in the condemnation.
4. **Estopel.** Whether or not a party is estopped by laches and acquiescence, is a question for the triers of the fact.
5. **Statute of Limitations.** This action was brought May 16th, 1877, to recover damages for a trespass which the evidence showed was completed in the year 1872, but at what time of the year did not appear. *Held*, that in the face of a finding by the trial court that the action was not barred by the five-year limitation act, this court would not presume that the trespass was completed prior to May 16th, 1872.

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6. **Accord and Satisfaction.** On the trial of an action against a railroad company for unlawfully occupying plaintiff's land, the plaintiff testified that before the company entered upon the land it gave plaintiff an agreement in writing to settle for it, but this agreement was not admitted or pleaded by the defendant as a defense, nor was it produced or offered to be produced at the trial. *Held*, that for the purpose of basing upon it a defense of accord and satisfaction, it was not before the court.

*Appeal from Linn Circuit Court.—Hon. G. D. BURGESS,
Judge.*

AFFIRMED.

Chas. A. Winslow and L. F. Hatfield for appellant.

A. W. Mullins for respondent.

MARTIN, C.—The plaintiff brought a suit on the 16th day of May, 1877, against the defendant as receiver of the Burlington & Southwestern Railway Company. The character of the action is somewhat peculiar. It is alleged in the petition that the North Missouri Central Railroad Company in 1868 located a portion of their line over and across the lands of the plaintiff, consisting of fifty-five acres off the east side of the northwest quarter, and the northeast quarter of the southeast quarter, all in section 7, township 58, range 20; that the company, without condemnation or leave, commenced and partly constructed their road through the plaintiff's land within the years 1868, 1869 and 1870; that on the 31st day of May, 1871, the company conveyed its franchises and rights to the St. Joseph & Iowa Railroad Company, and that on the 23rd day of June, 1871, the latter named company conveyed the same to the Burlington & Southwestern Railway Company; that in the year 1872 the latter company continued the construction of the road and completed the same across the plaintiff's land covering a strip 100 feet wide by a mile in length; that the construction of the road has so separated and divided his lands as

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to greatly impair their value, and that he has sustained damages by reason thereof in the sum of \$2,000, for which judgment is prayed. It is alleged that defendant became receiver of said last mentioned road in November, 1875. The petition concludes with an offer to convey the right of way to the company upon receipt of proper and just compensation for the damages sustained by him as aforesaid.

The defendant in answer pleaded the statute of limitations. He also set up as a defense a record in certain proceedings of condemnation which were commenced in June, 1869, and concluded in August, 1869. It was alleged that the commissioners who rendered the report of condemnation accidentally omitted that portion of the northeast quarter of section 7, which is covered with the road-bed; that the road over it was constructed under the belief that the strip was included in the report; that the plaintiff was a managing officer in the road and stood by and saw the construction of it at great cost and outlay and never manifested any claim or right to the land, by reason of which acts and doings he is estopped from prosecuting this suit. The answer also denies the sole ownership of plaintiff, and alleges that one H. C. Prewitt was owner of an undivided half thereof.

The case was tried by the court. Deeds were given in evidence showing that plaintiff owned an undivided half of the land at the time of the construction of the road, and that since then, and before suit, he had acquired the other half. The record of the proceedings in condemnation showed that the road-bed over all the plaintiff's land was included in the report of condemnation, except that over the southeast quarter. Evidence relating to the damages by the location of the road was submitted on both sides. The defendant introduced evidence tending to show that the road-bed over the southeast quarter was omitted from the report of the commissioners by mistake; that the road was graded through with the knowledge and approbation of plaintiff; that it was included in the assessment of dam-

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ages in the sum of \$1, which was made in the proceedings of condemnation; that the portion in the southeast quarter covered by the road amounted to about six acres. The plaintiff testified in rebuttal that he objected to the construction of the road until he should be paid; that the attorney of the road gave him a contract signed by the president of the road and by himself, to settle for the right of way; that in 1874 he got possession of the road and fenced it up; that the receiver took possession of it without saying anything to plaintiff about it, and has held it without his consent; that he has been paid nothing for the right of way, and that he has refused to relinquish or convey it for nothing.

The following instructions were given at the instance of plaintiff:

1. It is admitted by the pleadings in this case that the plaintiff is the owner of the lands described in the petition, and that he was such owner when the railroad was located and constructed over, through and across said lands, except as to the undivided one-half of the southeast quarter of section 7, township 58, range 20.

3. If the plaintiff's title to the lands in question is admitted by the pleadings in the case, or, if not so admitted, established by the evidence, then the burden of proof rests upon the defendant to show that the plaintiff has been divested of his title to the strip of land held and occupied as a right of way for said railway in the mode and manner and as provided by law.

7. And unless it affirmatively appears upon the face of the proceeding had in the matter of condemnation that every essential prerequisite of the statute conferring the authority has been fully complied with, then in such case every step from the inception to the termination is a mere nullity and the whole proceeding void.

8. If the court find for plaintiff, then, in estimating the damages sustained by him, the court should take into consideration not only the actual value of the strip of land

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taken and appropriated for the right of way, but also the diminution in value caused thereby, if any, of the residue of plaintiff's land from which said right of way was taken.

9. Under the evidence in this case the plaintiff is entitled to recover.

The following instructions were given at the instance of defendant :

2. The court further declares the law to be that if on the — day of May, 1869, ten days or more before the first Monday in June, 1869, the North Missouri Central Railroad Company filed a petition in the office of the clerk of the circuit court of this county against the plaintiff herein, Joseph Combs, and others, praying the court in due form of law to appoint commissioners to view and assess the damages to the lands described in the petition, or any part thereof, among other lands, and for the purpose of condemning and acquiring the right of way through and over said lands, and that the said Joseph Combs was duly summoned to the said June term of said court, and that on the 18th day of June, 1869, the said court made the order read in evidence duly appointing Helgman P. McClanahan, Benjamin F. Howe and Achilles M. Clarkson, disinterested citizens and residents of said Linn county, Missouri, commissioners to view the said lands and assess the damages sustained by reason of the construction of the said railway through the same, and the condemnation of the right of way thereover, and that said commissioners did, in pursuance of said appointment, on the 1st day of August, 1869, view said lands, or any part thereof, described in the petition, and did duly assess the damages sustained by plaintiff by reason of the acquiring of said right of way and the construction of said railroad across the same, and did fix the amount of such damages so sustained at the sum of \$1, and did on said day make a report of their said proceedings in writing, and subscribe and swear to the same, and the said report, together with the \$1 assessed for damages as aforesaid, were duly filed with and in the office of

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the clerk of the circuit court of this county immediately thereafter, and that by virtue of such proceedings so had the North Missouri Central Railroad Company took possession of said lands, so condemned, and constructed a railroad thereon, and that the same has since been by the said railroad company and its successors, and still is operated over and through said lands as a part of one continuous line of railway, then the finding should be for the defendant as to all that portion so condemned and taken.

3. If the court finds from the evidence that at the time of the entry upon the southeast quarter of said section 7 in 1869 by the North Missouri Central Railroad Company, and at the time of the location of the road through and over the same, and at the time of the grading and completing of the same the plaintiff was the owner of only one undivided half thereof, and that the other undivided half of said quarter section then belonged to one H. C. Prewitt, who made no claim or demand of said railroad company for right of way through the same, then in no event can the plaintiff recover more than one-half the actual value of the lands actually taken and appropriated by said railroad company.

The court refused to give the following instructions for defendant:

1. If the court should believe from the evidence that the North Missouri Central Railroad Company located the railroad over and through the lands in controversy which are described in the petition, and took possession of the same and commenced work thereon in the year 1869, then plaintiff's cause of action accrued at that time, and his cause of action is barred by the statute of limitations, and he cannot recover in this action.

4. Although the court may believe from the evidence that the plaintiff is entitled to recover damages for the lands described in the petition, or some part thereof, yet in no event should the finding be for more than the actual value of the land taken and appropriated by the railroad

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company, the right of way over which had not been previously, duly and regularly acquired by the said railroad company.

The court gave of its own motion the following declaration :

The record read in evidence by defendant for the purpose of showing a condemnation of the right of way through plaintiff's said lands under proceedings instituted by the North Missouri Central Railroad Company are insufficient to establish such alleged condemnation through all of plaintiff's lands, and plaintiff is not thereby precluded from recovery in this action.

The court found in favor of the plaintiff as to an undivided half of the portion of the road on the southeast quarter, and gave him judgment in the sum of \$450 damages. In deciding this case it is not necessary to go outside of the points raised and submitted by the defendant in his brief.

I. It is objected that no cause of action is contained in the petition or evidence, because the trespass complained of transpired before the receiver took charge of the road. This objection is made under a misconception of the object of this action and the nature of the judgment which was actually rendered in it. When a corporation passes into the hands of a receiver, it is taken by him subject to all the debts and liabilities existing against it, at the time of his appointment, whether rising from contract or tort. The court appointing him ascertains and adjusts these debts and liabilities, and orders a distribution of the assets in discharge thereof, according to the law and equity governing them. On application of the claimant, the court entertains and adjusts his rights. It may exercise the discretion of allowing the adjudication of his demand to be made in an independent suit, and this is usually done when the issues can be more conveniently tried in the place where the facts arise and the venue belongs. Before instituting his suit the claimant obtains leave from the court of which

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the receiver is an officer, to sue him in another tribunal, which was the case here. In respect to the past liabilities of the corporation, it is not pretended the receiver can be personally held. Nevertheless he is the representative of the corporation, taking its place in respect to the custody and administration of its estate, and toward its claimants and creditors he occupies a relation somewhat analogous to that of an administrator. The functions of the corporation being suspended as to its former managers, the receiver takes their place and holds and conducts everything in his own name. A suit, therefore, to ascertain and adjust a liability of the company is properly brought against the receiver in his capacity as such, somewhat in the same form as a suit against an administrator by a creditor of the estate of the deceased. The judgment goes against the defendant in his capacity as receiver, and is leviable out of the assets of the company in his hands. Such is the judgment in this case. Upon this judgment the court that granted leave to the plaintiff to sue will adjudge to him his equitable share in the assets of the company, and order payment according to the equities and priorities of the different claimants on the assets. In the case of *Commonwealth v. Runk*, 26 Pa. St. 235, the supreme court of Pennsylvania approved of a proceeding in this form to ascertain and adjust a legal demand, and ordered a judgment of the description I allude to. We have no knowledge of the condition of the assets of the company of which the defendant is receiver, and we have nothing to do with the enforcement of the plaintiff's demand against said assets. It must be classified and disposed of by the court having custody of the assets, somewhat in the manner of a judgment against an administrator leviable out of the assets of the estate he has charge of.

II. The counsel for defendant objected to the instruction given at plaintiff's request, numbered 8, for the reason that it leaves out of consideration the benefits which may have accrued to the plaintiff by construction of the road

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over his land. The benefits to be considered in such cases are such as the "land derives from the location of the road through it as are not common to the other lands in the same neighborhood." *Quincy R. R. Co. v. Ridge*, 57 Mo. 599; *Wyandotte R. R. Co. v. Waldo*, 70 Mo. 629. There was no evidence of any such benefits. The testimony of Stone and McClanahan consisted of an explanation of the rules pursued by them when as commissioners they made the former assessment. Neither they nor any other witnesses testified about the peculiar benefits inuring to plaintiff over other proprietors in the neighborhood by having a railroad graded diagonally across his farm.

III. The objection that the court ought to have found that the southeast quarter was included in the condemnation proceedings, is not well taken. The record shows that it was not in the report of condemnation, and the answer admits that it was not in. Such a finding would have been against the evidence and the admission of the defendant in his pleadings. The proceedings of condemnation could not be corrected in this suit, as all the parties to that record were not before the court, and no reform or correction was prayed for.

IV. The question as to whether the plaintiff was estopped by his laches and acquiescence in the conduct of the railroad is a question of fact on the evidence bearing upon it, which is contradictory. The court has, upon this evidence, found against the defendant, and we see nothing in the case to justify us in disturbing the conclusion which the court came to in rendering its judgment.

V. The objection that the action is barred by the statute of limitations, is not supported by the evidence. This being a mere action of trespass, it does not appear from the record that five years had elapsed since the construction of the road was finished and the trespass accomplished in 1872 as to the southeast quarter. This action was instituted in May, 1877, and it was incumbent on the defendant to make out his defense of the statute of limita-

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tions and prove that although the trespass ended in 1872, it was prior to May 16th, 1872, so as to leave no doubt about the bar of the statute. He has failed to do this, and the court having found against him, we do not feel authorized to help him out by any presumptions. We think, upon the law of presumptions, the inference must be the other way, inasmuch as they should be invoked to support rather than overthrow judgments. The finishing of the road was a continuing trespass, and under the statement that it transpired in 1872, there is nothing violent in the presumption that it continued the whole of the year. So far as plaintiff's right of action is concerned, a discrepancy in time is immaterial. So far as the defense of the statute is concerned, time is a material thing, and we think if the defendant wants the benefit of the statute he should bring himself within it by competent evidence.

VI. The allusion of plaintiff in his testimony to some written agreement with the road for settlement with him for the right of way cannot operate as a bar to his suit in this case. It is not admitted or pleaded by defendant as a defense, and it was not produced or offered to be produced at the trial. For the purpose of basing upon it a defense of accord and satisfaction of the matter on trial, it was not before the court.

The judgment is affirmed. PHILIPS, C., concurs; WINSLOW, C., not sitting, having been of counsel in the case.

THE CITY OF ST. LOUIS, *Appellant*, v. FRANKS.

Opening of Streets. The city charter provides that "no street shall be extended nearer than 500 feet to a street already opened, where the street runs north and south, except on the unanimous recommendation of the Board of Public Improvements." Held, that the unanimous recommendation of the board is in the nature of a jurisdictional fact without which the municipal assembly has no power

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to order the extension of a north and south street nearer than 500 feet to a street already opened, and without affirmative proof of which no proceeding for such an extension can be sustained.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Leverett Bell for appellant.

Bereman & Mason for respondent.

HENRY, J.—This was a proceeding commenced in June, 1878, in the St. Louis circuit court, to open Rosatti street, under an ordinance of the city. Rosatti street runs north and south, parallel with Second Carondelet avenue, and within 200 feet of said avenue.

Section 1, article 6, of the city charter provides: "That no street shall be extended nearer than 500 feet to a street already opened, where the street runs north and south, except on the unanimous recommendation of the Board of Public Improvements, submitted in writing to the assembly, and by it approved." There was no evidence to show that said board ever recommended the extension of this street; but it is contended by the city, that from the fact of the passage of the ordinance by the assembly, a prior compliance with all the requirements necessary to its validity is to be presumed. This was the opinion of the circuit court, but, on appeal to the court of appeals, that court held otherwise, and reversed the judgment, and the city has prosecuted her appeal to this court.

The power of eminent domain, as is said by Judge Dillon, in his work on Municipal Corporations, "is a tremendous power and one which is without theoretical limits, and, indeed, without any legal limitations, except such as may exist in written organic restraints upon legislative action." Vol. 2, § 453. Again he says: "In construing statutes or charters delegating the power of eminent domain, and pointing out the mode of exercising it, it is the

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duty of the judicial tribunal to insist that every provision intended for the benefit of the owner shall be complied with before he shall be divested of his property. Except so far as the mode of procedure is ordained by the constitution, it is competent for the legislature to prescribe it, and the mode prescribed must, as we have seen, be strictly and guardedly pursued, although unreasonable nicety should not be, and is not, required."

The recommendation of the Board of Public Improvements, required by the charter, is of the nature of a jurisdictional fact. The ordinance providing for the extension of Rosatti street was in substance and effect, the initial step in a judicial proceeding, to divest the owners of the land proposed to be taken of their title. No proceeding for this purpose could have been commenced until the passage of the special ordinance. An ordinance providing for the condemnation of property for the extension or opening of a street, is not like one passed under a general grant of discretionary power, as for instance, to pass ordinances relating to the health, comfort, morals, general welfare and good order of the inhabitants. Such laws directly affect all the inhabitants, and operate alike upon all, but the exercise of the power of eminent domain principally concerns the citizen whose property is to be taken; the exercise of this power by the city is forbidden, in the extension of streets, unless the extension be recommended by the Board of Public Improvements. The previous concurrence of that board is as essential to the validity of the ordinance as its enactment by the assembly. The recommendation of the board is the authority, under the city charter, by which the assembly institutes the proceeding. It is a special power confined to the assembly, to be exercised only on certain conditions precedent, the observance of which the city must show in establishing her right to extend the street.

The judgment of the court of appeals, all concurring, is affirmed.

Vautrain v. The St. Louis, Iron Mountain & Southern Railway Company.

VAUTRAIN V. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN
RAILWAY COMPANY, *Appellant.*

Weight of Evidence. Where the evidence upon all the issues made by the pleadings is conflicting, and there is no such preponderance against the finding of the jury, as to warrant the conclusion that it was the result of either passion or prejudice, the Supreme Court will not interfere.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Bennett Pike for appellant.

A. R. Taylor for respondent.

NORTON, J.—Plaintiff, who was a brakeman in the employ of defendant, brought this suit to recover damages for injuries alleged by him in his petition to have been sustained by the negligence of defendant in leaving a hole under a switch rod, on the track of the road where he was engaged as brakeman in coupling cars, and that while so engaged, without negligence on his part, his foot became fastened in said hole, and he was knocked down and run over by the cars, whereby his foot was crushed and his right arm so injured as to necessitate amputation at the shoulder.

The answer of defendant, besides containing a general denial of the allegations of the petition, set up contributory negligence on plaintiff's part, and averred that his injury was occasioned by his foot being caught in the frog on the track on which he was engaged in coupling cars, and further set up that plaintiff had received \$200 in satisfaction of his claim for damages, and had executed releases discharging defendant from all liability on account of said accident. The reply of plaintiff averred that the money received by him was in payment of what the company

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owed him on account, denied the execution of any releases, and averred that they were obtained by fraud and misrepresentation. On the trial plaintiff obtained judgment for \$6,000, which, on the appeal of defendant to the St. Louis court of appeals, was affirmed, and from this action of said court defendant has appealed.

On all the issues presented by the pleadings the evidence was conflicting. There was evidence tending to show that plaintiff was injured as claimed by him in his petition, and also evidence tending to show that his foot was caught in the frog, and that he was injured as claimed in the answer of defendant. There was also evidence tending to show that the releases offered in evidence were executed by defendant under the belief that they were mere receipts for money which the company owed him, and also evidence to the contrary. All these questions were for the jury to pass upon, and there being evidence tending to establish the theories of the case relied upon by the respective parties, we are not authorized to interfere with the finding of the jury, inasmuch as there is no such preponderance of evidence against their finding as leads us to conclude that their verdict was the result of either passion or prejudice.

The question whether plaintiff's injuries were occasioned without fault on his part, by reason of his foot being caught in a hole under the switch rod, and whether said hole had been negligently made and left there by defendant's servants engaged in working upon the track as trackmen, were fairly put to the jury, and plaintiff's right to recover was predicated upon the finding of the above facts. So was the question fairly submitted whether or not the releases set up in the answer were executed by plaintiff understandingly, or whether they were procured by artifice and fraud.

For the reasons herein given as well as those given in the opinion of the court of appeals, reported in 8 Mo. App. 538, the judgment is affirmed, in which all concur.

McQuade v. The City of St. Louis.

McQUADE V. THE CITY OF ST. LOUIS, Appellant.**Contract for City Work : NEED NOT BE IN WRITING : PAROL EVIDENCE.**

An ordinance of the city provided that no one should have power to create any liability on account of the Board of Park Commissioners except with the express authority of the board. By resolution of the board, a committee consisting of the president and two other persons were authorized to contract for certain work, "and to report." In an action on a written contract for the work signed by the president alone for the board; *Held*, that there being no law or ordinance requiring the contract to be in writing, parol evidence was admissible to show that the other members of the committee assented to the making of the contract. *Held* also, that as it did not appear that the contract was to be reported for approval or rejection by the board, failure of the committee to report it did not affect the rights of the contractor.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Leverett Bell for appellant, cited *McDonald v. The Mayor*, 68 N. Y. 23; *s. c.*, 23 Am. Rep. 144.

Robert Crawford for respondent.

HOUGH, C. J.—The petition in this case contains two counts. In the first count the plaintiff seeks to recover the value of certain work done by him under and in pursuance of a contract therefor, alleged to have been made with certain persons acting under authority of the Board of Park Commissioners. In the second count the plaintiff seeks to recover damages for the refusal of the defendant to permit plaintiff to perform said contract.

The plaintiff read in evidence the charter creating and ordinance regulating the Board of Park Commissioners. Section 13 of said ordinance provides that "None of said commissioners, or any person whether in the employ of said commissioners or otherwise, shall have the power to create any debt, obligation, claim or liability for or on account of

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said board, or the moneys or property under its control, except with the express authority of said board, conferred at a regular meeting thereof duly convened and held," etc.

The plaintiff read in evidence the record of a meeting of the Board of Park Commissioners of March 21st, 1872, at which it was resolved "that the president, Commissioner Bernard of the 11th ward, and the superintendent be authorized to make a contract to best advantage for the removal of rock and earth from the reservoir on Benton street to St. Louis Place, and to report."

Mr. Jacob S. Merrill was examined as a witness for plaintiff, and stated that he was a member of the park board in 1872, and a paper in words and figures as follows, was shown witness:

ST. LOUIS, March 26th, 1872.

To the Board of Park Commissioners:

I hereby agree to remove all the rock and earth on north side of reservoir in Benton street (outside of the original wall) and deposit the same in St. Louis Place, as may be directed by the superintendent of parks or park commissioners, or such party as may be legally placed in charge of the work, and to have the work all done in sixty days from this date, for the following price: Two feet of the entire height and length of the wall is to be measured by the perch at fifty cents per perch, the remainder, whether rock or earth, is to be measured as earth and the price to be twenty cents per yard, and I hereby bind myself in the sum of \$500 for the faithful performance of the work.

GEORGE MCQUADE.

I hereby unite in the above bond in the sum of \$500 for the faithful performance of the work by Mr. McQuade.

P. MACKLIN.

The above is accepted by the Board of Park Commissioners.

JACOB S. MERRILL, President.

The defendant conceded that the signatures to the paper were genuine. The witness was asked whether the

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contract was signed by order of the Board of Park Commissioners. The testimony, upon defendant's objection, was excluded.

The plaintiff also offered to prove that commissioner Bernard and the superintendent were present when Mr. Merrill indorsed the acceptance of the park commissioners on his proposal; that he was permitted to, and did, do certain work under his accepted proposal, and that the assistant city engineer made an estimate thereof and reported the same to the superintendent, and advised payment therefor, and that the superintendent stopped the work. This testimony the court refused to permit the plaintiff to introduce. The plaintiff took a non-suit with leave, which the circuit court refused to set aside, and rendered final judgment for the defendant. The court of appeals reversed the judgment of the circuit court, and the defendant has appealed to this court.

We think the circuit court erred in rejecting the testimony offered. The resolution of the Board of Park Commissioners, authorizing the president, Commissioner Bernard and the superintendent to make a contract for the removal of the earth in question, did not require that such contract should be in writing, nor has any law or ordinance requiring it to be in writing, been brought to our attention. It was competent to show by oral testimony that the persons authorized by the board, did in fact accept the proposal of the plaintiff, and that the written acceptance thereof by President Merrill on behalf of the park commissioners, was made with their knowledge and consent. The written acceptance by Merrill, offered in evidence, would not, of itself, bind the board, but an oral acceptance by all three of the persons named, would create a valid and binding contract, and the testimony offered had a tendency to establish that fact, and such testimony was not contradictory of the writing, but consistent therewith.

Whether the committee appointed to make the contract, made report of their action to the board, is wholly immaterial.

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terial, so far as the plaintiff's rights are concerned. Their failure in that regard could not affect the validity of any contract entered into by them with the plaintiff, inasmuch as the report required to be made does not appear to have been required for the purpose of subjecting their action to the approval or rejection of the board.

We are of opinion that the judgment of the court of appeals should be affirmed. The other judges concur.

THE STATE v. PHILLIPS, *Appellant*,

1. **Forgery.** An indictment under section 1399, Revised Statutes 1879, for uttering a forged instrument, need not charge an intent to defraud any particular person. It will be sufficient to charge generally an intent to defraud.
2. —. To support such an indictment, it is not necessary to show that the defendant obtained anything of value. The offense consists in uttering with an intent to defraud.

*Appeal from Greene Circuit Court.—HON. W. F. GEIGER,
Judge.*

AFFIRMED.

J. M. Patterson for appellant.

D. H. McIntyre, Attorney General, for the State.

HENRY, J.—At the November term, 1879, of the circuit court of Greene county, the defendant was indicted for uttering a forged instrument, and, on a trial, was convicted and sentenced to the penitentiary for a term of two years. He appeals from the judgment.

Section 1399, Revised Statutes 1879, under which he was indicted, declares that any one shall be deemed guilty of a forgery, who, with intent to defraud, shall pass, utter

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or publish, or attempt to pass, utter or publish, as true, any forged, counterfeited or falsely uttered instrument, knowing such instrument or writing to be uttered, forged or counterfeited; and section 1686 provides that: "It shall be sufficient in any indictment for any offense where an intent to injure, cheat or defraud shall be necessary to constitute the offense, to allege that defendant did the act with such intent, without alleging the intent of the defendant to be to injure, cheat or defraud any particular person." The indictment was sufficient. It did not charge an intent to defraud or cheat any particular person, but that the defendant did pass, utter and publish the forged instrument with the intent to injure and defraud.

There was no error in the refusal of the instruction asked by defendant to the effect, that unless the State had shown that the whisky obtained on the forged order was of some value, the jury should acquit. It was immaterial whether anything was obtained on the order or not. The offense consists in uttering it with an intent to defraud.

All concurring, the judgment is affirmed.

HUFFMAN V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Appellant.*

Master and Servant: EVIDENCE OF COMPETENCY. Mere proof of specific acts of carelessness on the part of a servant, without evidence of actual, or reasonably chargeable, knowledge thereof, on the part of the master, is insufficient to warrant a jury in inferring negligence on the part of the master in retaining such servant in his employ.

*Appeal from Grundy Circuit Court.—Hon. G. D. BURGESS,
Judge.*

REVERSED.

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Shanklin, Low & McDougal for appellant.

Notice of unfitness of an employe may be shown either by evidence tending to prove actual knowledge on the part of the employer of incompetency; or it may be shown that such unfitness was so general and patent, that not to take notice of it would be in itself evidence that the employer, if ignorant thereof, had not exercised due diligence in keeping himself advised as to the competency of his servant; but there was no such evidence in this case.

Geo. Hall for respondent.

The knowledge of the company need not be shown by direct or positive proof, but may be shown by evidence of particular acts of carelessness or negligence of the employe. *Murphy v. St. Louis & I. M. R. R. Co.*, 71 Mo. 202; *McKissock v. St. Louis, K. C. & N. Ry Co.*, 73 Mo. 456; *Ohio & Miss. Ry Co. v. Collarn*, 73 Ind. 261; *s. c.*, 38 Am. Rep. 134, 137; *Pittsburg, Ft. W. & C. R. R. Co. v. Ruby*, 38 Ind. 294; *s. c.*, 10 Am. Rep. 111; *Louisville & N. R. R. Co. v. Collins*, 2 Duvall (Ky.) 114; Wharton on Negligence, § 238 and note; *Baulec v. R. R. Co.*, 50 N. Y. 356; *s. c.*, 17 Am. Rep. 325: 1 Redfield on Railways, p. 552; *Galena & Chicago Union R. R. Co. v. Yarwood*, 17 Ill. 509; *Quimby v. R. R. Co.*, 23 Vt. 387.

SHERWOOD, J.—Action by Nancy A. Huffman to recover damages on account of the death of her husband. It was averred in the petition that Huffman, a brakeman on a freight train, received injuries causing his death, by reason of the negligence of one Isaac T. Smith, an engineer in the employ of the defendant, in the management of a locomotive. It was also averred among other things: That the defendant failed and neglected to exercise proper care and diligence in employing said Smith to run its engines on its said road, and negligently retained him in its em-

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ploy, as such engineer, after his incompetency and lack of skill became known, or might have become known to defendant by proper inquiry. The plaintiff introduced evidence tending to prove that at the time hereinafter stated, she was the wife of Zachariah T. Huffman; that on or about the 23rd day of July, 1877, her said husband was thrown from the top of a freight car then being run on defendant's railroad, receiving injuries from the effects of which he afterward died; that her said husband was thrown from the car, as aforesaid, in consequence of the carelessness of the engineer, Isaac Smith, then in charge of the locomotive engine pulling the train; that on several other occasions before that time, said Isaac Smith, while in the employ of defendant as an engineer, had been guilty of acts of negligence in running his engine too fast.

This case hinges on the sufficiency of the evidence of the plaintiff, a brief recital of which has been given. We regard that evidence insufficient for these reasons: There is nothing in it which shows, or which, as set forth in the bill of exceptions, tends to shew, that defendant was blame-worthy in retaining Smith in its employment. That he was originally competent; that he was highly commended as a careful, skillful and competent engineer, the evidence for the defendant very satisfactorily establishes. This shows that whatever may have been its subsequent derelictions of duty, the corporation, in the first instance, had done all that the law enjoined.

And the only evidence as to Smith's subsequent incompetency, is that already mentioned, that on the occasion in question he was careless and that several times prior thereto, he had been guilty of acts of negligence in running his engine too fast. It has frequently been ruled in this court, as well as elsewhere, that aside from some statutory provision, no rate of speed at which a train is run, is, as a matter of law, negligence *per se*. *Wallace v. R. R. Co.*, 74 Mo. 594, and cases cited. And the circumstances and surroundings—the relative situation—are to be considered be-

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fore negligence is to be inferred as a matter of fact. On the occasion to which the evidence refers, the unusual speed may have been exhibited under some pressing emergency, in broad-day light, on a perfectly straight and level track, in some remote rural district, or it may have been displayed under express orders to make up for unavoidable delays, and thus avert an impending collision. If so, the inference that Smith was, on this account, incompetent, would seem to be a strained and unnatural one. And even if this were not so, if these bursts of speed of Smith's engine, though unauthorized and unwarranted, occurring in the locality supposed, far from populous towns, it would scarcely be fair to infer that the defendant had notice of these occasional derelictions of duty. If, however, the fact is, that the unaccustomed rates of speed were exhibited in the crowded centers of population, where such speed would attract attention and provoke comment, probably giving rise to severe animadversions from the local press, it cannot be denied that "several" such occurrences, or perhaps, one or two, prior to the one forming the basis of the action, might be a sufficient ground wherefrom the jury might very well infer notice to the corporation of the unfitness of an engineer for further employment, found guilty of such acts. On this point, the evidence does not inform us, where or when the engine was run too fast, nor in what circumstances, so as to afford ground for inferences of fact unfavorable to the action of the company in retaining Smith in its employment, nor does that evidence show any direct notice to the defendant of the "several other occasions" of Smith's negligence as aforesaid, and in this consists its entire insufficiency.

Cases of this sort are obviously analogous to those where a municipal corporation is sued for an injury arising from a defect in one of its streets, where one of two things must be shown to hold the city liable, either notice of the defect directly communicated to the city, or evidence that the defect had continued so long as to allow the inference

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to be drawn that notice of such defect had been communicated. True, the law will require in cases like this one, that a railroad corporation, having great interests entrusted to its custody, being the guardian, *pro hac vice*, of life, limb and property, after having done all that is requisite in securing competent servants, shall still keep up a supervision over them, to see that they do not fall short of the standard of their original competency; but surely the law will not go so far as to hold a railroad corporation to such an extreme of circumspection, as to compel it to note, at its peril, every lapse of its employes, where no notice thereof is directly communicated, and where the circumstances are not such as to afford a reasonable inference of the derelict conduct of the employe having become known to the employer prior to the act which gives origin to the action for damages.

The rule on this point is well stated in Wood on Master and Servant, p. 800, § 419, as follows: "Therefore, the mere fact that a fellow-servant is incompetent, that materials have proved defective, or that the appliances or machinery used in the prosecution of the business have proved insufficient, does not tend even *prima facie* to establish negligence on his part, but the burden in all such cases is upon the servant seeking a recovery to establish the fact, that the injury resulted to him because the master did not exercise reasonable and proper care in these respects, or either of them, and this must be established as a fact in the case, and cannot result as an inference from the circumstances that the servant causing the injury was in fact incompetent, or that the materials or resources of the business were in fact defective." And it is elsewhere stated that: "In actions brought by servants against their master, the burden of proof as to the master's knowledge or culpability in lacking knowledge of the defect which led to the injury, whether in the character of a fellow-servant or in the quality of the materials used, rests upon the plaintiff." Shearman & Redfield on Neg., § 99. The authorities

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cited for the defendant fully support the position taken in this opinion, and with, perhaps, one exception, so do those cited for the plaintiff.

For the reasons aforesaid, we reverse the judgment and also remand the cause, because on a re-trial thereof, the plaintiff may be able to show such circumstances as will supply the element now lacking in her evidence, and thus show the liability of the defendant. All concur.

COPENHAVER *et al.*, *Appellants*, v. COPENHAVER.

1. **Descents and Distributions:** GRAND-NEPHEWS. Under the statute of Descents and Distributions, (R. S. 1879, § 2161,) the children of the deceased nephews and nieces of an intestate, are not cut off from sharing in his estate.
2. — : — . Under the statute of Descents and Distributions, (R. S. 1879, § 2165,) where nephews and nieces of an intestate inherit from him, together with his grand-nephews and grand-nieces, and there are none nearer of kin, the former will take in their own right, *per capita*, and the latter by representation, or *per stirpes*.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Norton, Martin & Dryden and Dryden & Dryden for appellants.

McKee, Dunn & Colbert for respondents.

NORTON, J.—This was an application to the probate court of Lincoln county, for distribution of an intestate estate. Jacob Copenhaver, being possessed of a large amount of real and personal estate in Lincoln county, died intestate in the year 1878, leaving neither descendants, father, mother, brothers nor sisters living, but leaving thirty-two nephews and nieces and twenty-five known

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grand-nephews and grand-nieces, (the plaintiffs and defendants in this suit,) and the unknown heirs of one niece who was living at the time of the death of the intestate, but who has since died. These nephews and nieces and grand-nephews and grand-nieces are the offspring in unequal numbers of seven brothers and sisters of the intestate—all he had ever had—all of whom died before the intestate, as will appear from the agreed statement of facts, which is as follows:

"In the matter of the distribution of the estate of Jacob Copenhaver, deceased. It is agreed by the distributees in the above entitled matter that Jacob Copenhaver died in February, 1878, possessed of a large amount of real and personal property, leaving no children or their descendants, nor father, mother, brothers or sisters living, but left as his only heirs at law, thirty-two nephews and nieces and twenty-five known grand-nephews and nieces, and the unknown heirs of one niece living at the time of his death; and it is further agreed that the only questions in this matter submitted for the decision of the court are: 1st, Do the nephews and nieces living at the time of the death of said Jacob Copenhaver take *per stirpes* the share their ancestor would take, or do they take *per capita* in their own right? 2nd, Do the children of the nephews and nieces take the shares their ancestors would have taken if living, or are they, by the law of descent, cut off from any share of the estate?"

The probate court, to which the application was made for distribution of \$10,000, decided that the nephews and nieces took *per capita* and that the grand-nephews and grand-nieces took *per stirpes* the shares their immediate ancestors would have taken had they been alive. The circuit court on appeal reversed this decision and ordered that the estate be divided into seven equal parts corresponding to the number of the intestate's deceased brothers and sisters, and each part to be distributed *per stirpes* among the descendants of the respective brothers and sisters—that is, the descendants of each several brother or sister taking together the share

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such brother or sister would have taken if alive. On writ of error the court of appeals reversed the judgment of the circuit court, from which court the case is brought here by appeal.

The answer to the interrogatories propounded by the agreed statement of facts is to be ascertained by an examination of the law of Descents and Distributions as regulated by our statute, and the two sections bearing upon the subject are sections 2161 and 2165, Revised Statutes 1879. So much of said section 2161 as is material to the elucidation of the questions involved, is as follows: "When any person having title to any real estate of inheritance or personal estate undisposed of, or otherwise limited by marriage settlement, shall die intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of debts and the widow's dower, in the following course: 1st, To his children or their descendants, in equal parts; 2nd, If there be no children or their descendants, then to his father, mother, brothers and sisters, and their descendants, in equal parts, * * * " It will be perceived that the object of this section is to regulate the course of descents and to designate what persons are entitled to participate in the distribution of an intestate's estate; and as the intestate in this case died without leaving children or their descendants, and without leaving either father, mother, brother or sister, under the second subdivision of said section the descendants of his brothers and sisters are clearly entitled to distribution, and as nephews and nieces, as well as grand-nephews and grand-nieces, are embraced and included in the word descendants, they are all entitled to distribution, and the question "Are the children of the nephews and nieces by the law of descents cut off from any share in the estate," must be answered in the negative.

Having ascertained that under said section 2161 the grand-nephews and grand-nieces as well as the nephews

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2 — : — . . . and nieces are entitled to distribution, the only question remaining to be determined is, as to how and in what proportion they are to take. This question is solved by section 2165, Revised Statutes 1879, which provides that: "When several lineal descendants, all of equal degree of consanguinity to the intestate or his father, mother, brothers and sisters, or his grandfather, grandmother, uncles and aunts, or any ancestor living, and their children, come into partition, they shall take *per capita*, that is, by persons; where a part of them are dead and part living, and the issue of those dead have a right to partition, such issue shall take *per stirpes*, that is, the share of the deceased parent." While this section is somewhat confused by the multiplication of words, we think it is quite evident that it conveys the idea that when several lineal descendants all of equal degree of consanguinity to the intestate come into partition, as in this case, with others of a more remote degree, that the former take *per capita* and the latter *per stirpes*. So that in the case before us, as made by the agreed statement, the result would be, that the nephews and nieces would take in their own right, *per capita*, and the grand-nephews and grand-nieces would take by representation, or *per stirpes*.

The above is the conclusion reached by the court of appeals in its opinion reported in 9 Mo. App. 200, where the questions presented are at some length discussed, and for the reasons therein given and what is herein said, the judgment of said court reversing the judgment of the circuit court is hereby affirmed. All concur.

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WEAD, *Appellant*, v. GRAY.

1. **Wills:** ABSOLUTE POWER OF DISPOSAL CONFERRED BY WILL: EXECUTORIAL DEVISE. A will was as follows: "I give and bequeath to my only child, Rachel * * * all my property, real, personal and mixed, * * * wishing my said daughter to have, use and dispose of the same absolutely in any way that may seem to her best, * * * it being the intention of this, my last will and testament, that my said daughter shall have and dispose of all my said property in her own right as absolute owner * * and that the same, and its proceeds and increase, if not disposed of and expended by her in her lifetime, shall descend at her death to her children * * *; but if the said Rachel should die leaving no children nor their descendants, and without having disposed of said property, it is then my will that out of what may remain undisposed of by her," certain specified legacies should be paid. *Held*, 1st, that the will vested in the daughter of the testatrix an absolute and unlimited estate; 2nd, that the absolute power of disposal vested in the daughter included the power to dispose of the property by will as well as by deed; 3rd, that the limitation over to the legatees was void as an executory devise, being inconsistent with the absolute power of disposal vested in the daughter.
2. **Deeds of Trust:** RELEASE: MERGER. Where there were several notes secured by successive deeds of trust on the same land, and two of the notes were devised to the owner of the equity of redemption; *Held*, that although the technical doctrine of merger had no application, yet in the absence of any evidence that the devisee had kept the two notes alive, the devise would be treated as a release and cancellation of them.

Appeal from St. Louis Court of Appeals.

REVERSED.

W. B. Homer and Levi Davis for appellant.

M. L. Gray for respondents.

HENRY, J.—This is a suit in which plaintiff asks the cancellation of two deeds of trust on certain real estate in Kirkwood, St. Louis county, and the facts of the case are as follows:

Spencer Smith was seized of said real estate in fee,

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and, in July, 1861, he borrowed of Mrs. McLean \$1,000, for which he executed his note and a deed of trust on said real estate to secure it. In 1866 he borrowed of M. L. Gray \$2,482, for which he executed his note and a deed of trust on the same property. In 1870 Smith died leaving a will, by which he devised said real estate to his wife Rachel. The two notes above mentioned were at her death in March, 1874, owned by Mrs. Charlotte Wead, mother of Rachel Smith. She died testate, and the following is a copy of her last will and testament:

"I, Charlotte Wead, of St. Louis, State of Missouri, being, according to my own apprehension, of sound and disposing mind, do make, ordain and publish this, my last will and testament: I give and bequeath to my only child, Rachel E. Smith, wife of Spencer Smith, now of St. Louis, State of Missouri, all of my property, real, personal and mixed, and all moneys and rights of action of every kind which may belong to me, or to which I may be in any way entitled at my decease, wishing my said daughter to have, use and dispose of the same absolutely in any way that may seem to her best, and for her own sole and separate use and benefit, and entirely free and clear and exclusive of any and all right, interference or control of her husband, the said Spencer Smith; it being the intention and meaning of this, my last will and testament, that my said daughter, Rachel E. Smith, shall have and dispose of all my said property in her own right as absolute owner and as though she were a *femme sole*, and that the same, and its proceeds and increase, if not disposed of and expended by her in her lifetime, shall descend at her death to her children and exclusive of her said husband; but if the said Rachel E. should die leaving no children nor their descendants, and without having disposed of the said property, it is then my will that out of what may remain undisposed of by her the sum of \$200 shall be paid to the Domestic Missionary Society of the Protestant Episcopal Church, in the United States of America, and that the remainder of

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what may be left undisposed of by my said daughter at her death, shall be put at interest on good security and the interest thereof annually shall be paid to my niece, Ann S. Beach, during her natural life for her own separate and exclusive benefit, and at her death the remainder shall be paid to the above named Domestic Missionary Society, to be applied to the use of said society. In witness," etc.

In August, 1874, M. L. Gray, respondent, was appointed administrator with the will annexed of said estate, and took possession of and holds said notes. Mrs. Smith survived her mother, and died in January, 1875, leaving a will, of which the following is a copy:

"I, Rachel E. Smith, of Kirkwood, St. Louis county, Missouri, do make, publish and declare the following to be my last will and testament: I desire all my just debts to be paid, including the incumbrances on my residence property at Kirkwood, placed there by my late husband, Spencer Smith. I make the following bequests: To Mrs. Ann S. Lear I give my watch and \$500. To Reginald Heber Lear, son of Ann S. Lear, I give, for his name, \$500, to be paid him upon his arriving at the age of twenty-one years. All the rest of my property, real, personal and mixed, I give and bequeath to Charles Minor Wead, the son of D. D. Wead, now of Sheldon, Vermont, whom I hereby adopt as my son and heir, for I love him as such and believe him to be fully worthy of that love. In the event that my estate shall not be sufficient, after the payment of debts, fully to satisfy the bequests to Ann S. Lear and Reginald Heber Lear, I desire and direct in such case that the above bequests to Ann S. Lear and Reginald Heber Lear be paid *pro rata* so far as the property will go. I name and appoint my friend Melvin L. Gray, of St. Louis, executor of my last will and testament."

At her death there were other deeds of trust upon said real estate, executed by her husband in his lifetime, in which Charlotte Wead never had any interest. M. L. Gray, as administrator of the estate of Charlotte Wead,

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inventoried the two notes held by Mrs. Wead as assets of her estate, and, contending that they are subsisting claims against the said real estate, refused to deliver them to appellant, and, on the same ground, the Domestic Missionary Society of the Protestant Episcopal Church, and Ann S. Lear claim an interest in said notes as legatees under Mrs. Wead's will. The circuit court rendered a decree in favor of plaintiff, which, on appeal to the St. Louis court of appeals, was reversed, and plaintiff has prosecuted his appeal to this court.

The case turns upon the construction of Mrs. Wead's will, and the principal question is: What estate in the

1. WILLS: absolute power of disposal conferred by will: executory devise. property mentioned in that will, did Mrs. Smith take? Respondents insist that, by the will only a life estate was given to her, and appellants, that she took an absolute unlimited estate. If the latter be the proper construction of the will, neither the Missionary Society nor Mrs. Lear has any interest in the estate, and the decree of the circuit court was right.

Respondents, for their construction of the will, rely upon a class of cases, in which express life estates were given by the wills with power of disposition over the property, in some instances as broad as that given by Mrs. Wead's will, in others more restricted; but generally, where no estate for life was created in express terms, the wills have been held to give the absolute property, notwithstanding a limitation over of what might remain undisposed of by the first taker. There are exceptional cases. *Smith v. Bell*, 6 Pet. 68, relied upon by respondents' counsel, is of that class. But that case has not been followed in this State. In *Reinders v. Koppelmann*, 68 No. 491, Judge Napton, delivering the opinion of this court, quotes what was said by Sir William Grant in *Barford v. Street*, 16 Ves. 135: "An estate for life with an unqualified power of appointing the inheritance, comprehends everything. By her interest she can convey her life estate. By the unlimited power she can appoint the inheritance. The whole fee

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is then subject to her disposition," and Judge Napton adds: "A party cannot give an unlimited dominion of his property to one, and at the same time, a limited right in it to another; in other words, a remainder cannot be engrafted on a fee."

In the construction of a will, it is a question of intention, to be ascertained by construing all parts of the will together, and the intention, if not in contravention of some inflexible rule of law, is to control. It would be difficult to find words more apt to convey an absolute and unlimited ownership of personal property than those employed in Mrs. Wead's will, and the language clearly expresses that intention. That portion of the will by which it is attempted to give the property undisposed of by Mrs. Smith at her death, to respondents, was intended to meet a probable contingency, and was, as is not unfrequently the case, an abortive effort to give to one the absolute property, and at the same time "to engraft a remainder upon it," but by no means thereby intending to abridge the estate previously conferred upon the first taker. That by will, there may be a limitation of a future estate or interest in land or personal property, which cannot consistently, with the rules of law, take effect as a remainder, but may notwithstanding be upheld as an executory devise, we concede; but this question will be noticed hereafter.

In *Gregory v. Cowgill*, 19 Mo. 416, it is announced as a general rule, "that the devise of an estate generally and indefinitely, with a power of disposition over it, carries a fee." In *Rubey v. Barnett*, 12 Mo. 3, a life estate was in express terms given to the wife. In *Chiles v. Bartleson*, 21 Mo. 344, by one clause of the will, certain property was given to the wife—no power of disposition expressed, and no words declaring the extent of her estate; but, by a subsequent clause, the property given to her, not what might remain, but the identical property, was, at her death, to be equally divided between the testator's four children. It is clear enough that the wife took but a life estate. The lan-

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guage employed in the will passed upon in the *State ex rel. Haines v. Tolson*, 73 Mo. 320: "To have, hold and enjoy, to the only proper use and behoof of the said M. S. Paige and her heirs forever," does not more clearly indicate an intention to give an absolute estate in the property than does the language of Mrs. Wead's will. That, in the absence of a limitation over, it would pass an absolute ownership, no one would deny. To this all the cases agree; and if, from the whole instrument the intent to give only a life estate had been manifest in the will under consideration in the *State ex rel. v. Tolson*, those additional words would not have controlled in determining the character of the estate of the first taker. By a technical rule of law the word "heirs" was necessary in a common law conveyance to create an estate of inheritance, but in wills, other words, indicating the same intent, are of equal force. If the language in Mrs. Wead's will in the bequest to Mrs. Smith means just what the language of the will in the *State ex rel. v. Tolson* means, the cases are parallel. *Turner v. Timberlake*, 53 Mo. 378, is distinguishable from this, in that there the testator, in one clause of his will, provided for the sale of specific property for the payment of debts, and the succeeding clause was as follows: "I give and bequeath to my wife and my two children, (naming them,) the remainder of all my lands, negroes and other property *

* that may remain after liquidation of my debts, to be disposed of by my wife in any way she may think best, so that the property or its effects may be appropriated to her use and benefit during her natural life, and at her natural death, the remainder to the children." Here a life estate was given to the wife with a power of disposition. It was so construed by this court, but it is by no means an authority for the construction of Mrs. Wead's will contended for by respondents. Nor is there any conflict between *Bryant v. Christian*, 58 Mo. 98; *Carr v. Dings*, 58 Mo. 400; *Harbison v. Swan*, 58 Mo. 147, or *Thompson v. Craig*, 64 Mo. 312, and what is herein announced. *Foote*

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v. Sanders, 72 Mo. 616, fully sustains the views expressed in this opinion, and, in that case it was expressly declared that the doctrine of *Smith v. Bell*, 6 Pet. 68, does not obtain in this State, but that the contrary was held in *Owen v. Ellis*, 64 Mo. 77; *Campbell v. Johnson*, 65 Mo. 439, and *Owen v. Switzer*, 51 Mo. 322.

But conceding for the argument, that on a proper construction of the will, Mrs. Smith took a life estate with the power of disposition, the contingency in which the respondents were to take was that there was property embraced in the will undisposed of by Mrs. Smith at her death. The language of the will is: "But if the said Rachel should die leaving no children, nor their descendants, and without having disposed of the said property," then such remainder is to go to the respondents. The absolute power of disposition given by the will to Mrs. Smith, included the power to dispose of the property as well by will as by deeds to real estate, or bills of sale of personal property. *Kimball v. Sullivan*, 113 Mass. 345. The power was to dispose of all the property, "in her own right as absolute owner, and as though she was a *femme sole*," and the respondents were to take only such of the property as remained undisposed of by Mrs. Smith, and there was none.

The limitation over was void as an executory devise. Mr. Sedgwick, in his work on Wills, vol. 2, p. 277, says: "It is a settled rule of American as well as English law, that where the first devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of appointment among certain specified persons or classes, any estate over is void, as being inconsistent with the first gift." *State ex rel: Haines v. Tolson, supra*. In order to hold the limitation over, to be good as an executory devise, the power to dispose of the property given to Mrs. Smith must be rejected.

The technical doctrine of merger has no application to the facts of this case. Mrs. Smith derived no legal or

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2. DEEDS OF TRUST: equitable title to the real estate in question,
release: merger. under Mrs. Wead's will. She never held the legal title. After the two notes were bequeathed to her by Mrs. Wead, the legal title was still outstanding under the other mortgages executed by her husband, Spencer Smith, in his lifetime. Mrs. Wead had neither the legal nor the equitable title to devise. She was not the mortgagee. She became, as assignee of the notes secured by the mortgage, the beneficiary, but the legal title to the land was in the trustee. The bequest of the notes to Mrs. Smith, who owned, under her husband's will, the equity of redemption, in the real estate, was, in effect, a release or cancellation of the debts. While she had the right to keep the notes alive, if she saw proper, yet it required some act on her part to do it. They were hers from the death of Mrs. Wead, subject to any demands of creditors of that estate, and the case is to be treated, there being no creditors of Mrs. Wead's estate, as if Mr. Gray had, as he might have done with safety, delivered them to Mrs. Smith in her lifetime. They would have been in her hands as if cancelled, just as a note in the hands of a debtor, who has discharged it, possesses no obligatory character. If found among his papers at his death, no one could base any claim upon it. In his lifetime he might have re-issued it, or by his will, for some purposes, kept it alive, but otherwise it ceased to be an obligation.

Mrs. Smith, in her will, requires that the mortgages on her property should be paid, but evidently she had in her mind the other mortgages which were liens upon her land. It would be a violent construction of her language to apply it to debts against the property of which she had become owner, and no reason is perceived or can be conjectured, why she should desire to keep in life and force the notes in question. Certainly not for the benefit of respondents, for whom no provision is made in her will, but on the contrary, her express desire was, that all of the property should go to other parties.

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The judgment of the court of appeals is reversed. All concur.

LOWER v. THE BUCHANAN BANK *et al.*, *Appellants.*

Co-sureties, Rights of: EXECUTION, EFFECT OF RELEASE OF LEVY. Although the statute, (Wag. Stat., p. 370, § 9,) abrogates the common law rule that the voluntary release of one surety discharges the other, yet where, at the request of one surety, the judgment creditor levies upon property of another, and then releases the levy upon the payment of a portion only of the value of such property, he will be held accountable for its full value upon his attempt to collect the remainder of the debt from the first surety; after the levy, he will be regarded as the trustee of the execution for all parties interested, and will not be permitted to injure them by his release of the levy.

*Appeal from Buchanan Circuit Court.—Hon. Jos. P. GRUBB,
Judge.*

AFFIRMED.

B. R. Vineyard for appellants.

Woodson & Crosby for respondent.

PHILIPS, C.—This is a bill for injunction. It appears that the Buchanan Bank, in 1870, recovered judgment in the circuit court of Buchanan county, against M. D. Morgan, William Ridenbaugh, George I. Gibson and Isaac Lower, for the sum of \$4,575.27, founded on a promissory note executed to said bank by Morgan, as principal, and the other parties thereto as sureties. Morgan having failed in business and gone into bankruptcy, Lower notified and requested the bank to sue on the note, so as to protect him as surety, as soon as possible. Ridenbaugh also became insolvent, leaving Lower and Gibson bound to make good

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any deficiency not collected from Morgan's estate. There seems to have been in Lower's mind at least some apprehension as to Gibson's solvency. Accordingly, Lower directed Allen H. Vories, attorney for the bank, to have execution issued, and the sheriff directed to levy the same on a lot of cattle discovered by Lower, belonging to Gibson. This was done, and the sheriff levied on cattle of Gibson's, of the admitted value of \$1,800. It seems that Vories instructed the sheriff not to levy on exceeding \$1,500 worth of property. Gibson gave to the sheriff a delivery bond for the cattle seized. By direction of the bank's attorney, the cattle were released from the levy, on the payment by Gibson of \$900, leaving a balance of \$4,140.41 unpaid on the judgment. In August, 1871, there was paid thereon by Morgan's estate, \$1,288.38. In December, 1871, the plaintiff, Lower, paid thereon \$900, leaving a balance yet due of \$2,154.11. Afterward, Morgan's estate paid thereon \$277.73; so that on the 5th day of May, 1878, there remained unpaid, \$3,010.77, when plaintiff paid thereon \$1,552.50, being in excess of one-half of said judgment. In December following the sheriff, at the instance of Abbott P. Goff, the assignee of said bank, caused the real estate of Lower to be levied on to satisfy the residue of said judgment, and was proceeding to sell the same, when Lower instituted this action against the bank and Goff, to enjoin the sale.

The defense set up in the answer in justification of the release of Gibson's property from the execution is, that Lower suggested that \$900 would be sufficient to pay Gibson's *pro rata* of said judgment, and that was all he desired then to realize from Gibson. The answer admits that thenceforth Gibson became "hopelessly insolvent."

On hearing the evidence, the court found the issues for plaintiff, and made the injunction perpetual. Defendant brings the cause here on appeal.

It is apparent from the allegations of the petition and proofs, that if the bank had realized the \$1,800 on the

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cattle levied on, it would have collected from Gibson one-half of the judgment remaining after crediting it with the sums collected from Morgan's estate, and to that extent lessened the burdens of the co-surety.

But the defendant contends that conceding all the petition alleges, no cause of action is shown, because, by section 9, chapter 34, page 270, Wagner's Statutes, it was lawful for him to "compound with any and every one or more of his debtors for such sum as he may see fit, and to release him * * without impairing his right to demand and collect the balance, etc., from the other debtors," reserving, however, the right to contribution between the co-debtors. There can be no question but that this statute does away with the common law rule that the voluntary release of one co-surety discharges the other. But whether it applies to the circumstances of a case like the one at bar, appealing so strongly to the protecting arm of the chancellor, does not appear clearly to have been passed on by the Supreme Court of this State.

The only case found in which the equity rule in question between the creditor and surety has been invoked since the foregoing provision was first enacted, (§ 14, pp. 873, 874, vol. 1, Stat. 1855,) is the case of the *State ex rel. Midgett v. Matson*, 44 Mo. 805, decided in 1869. From the reported case it is not apparent when the administrator's bond, which formed the basis of the action, was executed, whether prior or subsequent to the enactment aforesaid. Be this fact as it may, Wagner, J., in delivering the opinion, pages 308, 309, uses this language: "A release of the principal will always discharge the surety; but one surety may be discharged without prejudice to an action against the others to the extent that they would be liable in a suit for contribution between themselves. The discharge of one surety cannot be permitted to increase the liability of the others;" which would indicate that he had in his mind the statutory provision in question, and did not believe it worked the injustice to increase the liability of a surety.

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I think this statute means exactly what it says. It is "lawful" for the creditor to compound with one debtor without discharging the co-debtor; but it gives no license to him to release from the operation of his judgment or execution lien, property of a co-surety under circumstances that would operate as a fraud on the other surety and increase his liability. Natural justice demands that one man having become surety with another, shall not have the whole debt thrown on him by the trick, bad faith or gross neglect of the creditor. This he was not permitted by equity to do prior to the statute of 1855; and if he may so do since, of what avail was the proviso of said section, saving to the surety his right of contribution, when by the abuse of the license given in the preceding part of the section the creditor might destroy the means of contribution? No one conversant with equity would for a moment question that if the creditor should so act as to release the principal debtor or to let go a lien held by him on the principal's property, but that it would to that extent discharge the surety. Why should the equity principle be different when applied to his conduct toward the sureties *inter sese*?

In *Baird v. Rice*, 1 Call (Va.) 18, where A recovered judgment against B, and C as surety, and levied on B's property, and then receiving part of the money, extended the time as to the balance and released the goods; held, that C, not having assented to it was entitled to be protected in equity by injunction against a second execution issued against his property. The court say, *inter alia*, that the levy on personal property was in law a satisfaction, at least *pro tanto*, of the execution, and had the sheriff done his duty in making his return according to the legal effect of the levy, it would have appeared that the debt was so far satisfied. But having neglected this duty, the surety was driven into equity for relief, "where things are considered as performed, which ought to have been done." The levy on personal property sufficient to satisfy the judgment, is a satisfaction of the judgment, without some controlling

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fact. *Blair v. Caldwell*, 3 Mo. 249; Freeman on Execution, § 269. In *Ferguson v. Turner*, 7 Mo. 497, this court first held that such a levy and release discharged the surety. Judge Napton, after conceding that the creditor was under no legal obligation to sue or levy, declares that having acted and secured a specific lien he had no right to yield it without the consent of the surety. "The surety, as soon as the lien of the execution attached, was interested in the retention of that lien, and the discharge of the lien discharged the security."

The supreme court of Mississippi, in *Bowen v. Hoskins*, 45 Miss. 183; s. c., 7 Am. Rep. 728, held that where one of two sureties has made or is about to make a secret fraudulent conveyance, so as to throw the burden of the debt on his co-surety, the principal being insolvent, a court of chancery will interpose to prevent it at the suit of the co-surety; that the same aid will be extended under such circumstances in favor of one surety against another, which will be granted him against the principal. This question is thoroughly discussed by Judge Ryland in *Rice v. Morton*, 19 Mo. 263, where it is held that where A recovers judgment against B and C as sureties, and the holder of the judgment directs the sheriff to return the execution unsatisfied, when one-half of the debt might otherwise have been made out of the property of B, C is discharged to the extent of one-half of the debt.

We must not be understood as advancing the proposition that a creditor is under any obligation to take the initiative to protect the surety. He has a right, as a rule, under the statute, to proceed against one or more of his joint debtors, to say to one, you may go, and to the others you must pay all. But where, of his own motion, and especially at the instance of any of the co-debtors, for his protection, the creditor obtains a special security or lien on the property of one of the joint debtors, equity and good faith impose on him a trust duty—to preserve the lien for the protection of the other surety, in order that his right

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of contribution may be secured to him. "The principle is that he is a trustee of the execution for all parties interested." *Mayhew v. Crickett*, 2 Swanst. 185, 190. As Judge Ryland, in *Rice v. Morton*, *supra*, 281, aptly puts it: "The question is not, what degree of diligence is required, or what degree of negligence may be permitted in the judgment creditor, in relation to the safety of the sureties, but how far he may be allowed to injure them by his acts."

The bank knew of Morgan's (the principal's) insolvency and that any deficiency after the distribution of his assets, would have to be made good by the sureties. Ridenbaugh was totally insolvent. Gibson was doubtful. Lower discovered personal property of Gibson's, of a movable character, which if seized immediately could be secured for Lower's protection. He advised the bank of this, and requested it to levy on it. It may be conceded that the bank was under no legal obligation to respond to Lower's request, as it had a right to compound with Gibson and look to Lower to discharge the whole debt. And it may be equally true that Lower at the outset might have protected himself by paying off the debt and pursuing Gibson for contribution. But when the bank was advised of Lower's extremity, and undertook to aid him by making the levy and securing enough property to satisfy Gibson's half of the debt, it became "a trustee of the execution for all parties interested," and it could not "injure them by its acts." By thus voluntarily undertaking to protect Lower, it lulled him to inaction, and in effect declared to him: I will subject this property to this debt for your protection, and you need take no other action for your security!

The evidence shows that perhaps all parties concerned were of the opinion that \$900 from each of the sureties would acquit them, and that each of them accordingly paid that sum. But this belief was begotten in the mind of the sureties by the suggestion of the bank's officer and agent. The evidence wholly fails (and so the circuit judge who heard it must have found) to show that Lower ever re-

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quested or consented that the levy on the cattle might be released. If the bank assumed that the \$900 paid by Gibson would probably meet his one-half of the liability, after the anticipated dividends from Morgan's estate were realized, while its conduct may have been free from any intended fraud, yet it acted at its peril in releasing the cattle, and it could not plead its misjudgment to the irreparable injury of the co-surety. Lower seems to have done all that an honest surety ought to have done, and if there is a loss to the bank it is not his fault. It is, to put the case mildly for the defendant, an instance where one of two parties of equal merit must suffer from the transaction, and he whose conduct has occasioned the injury should bear the loss.

Defendant's counsel suggests that, as the cattle were not forthcoming according to the requirements of the delivery bond taken by the sheriff, the bond is yet in force, and the plaintiff has his equitable remedy thereon by substitution. It is deemed a sufficient answer to this to say, that where the plaintiff in the execution accepted so much money and consented that the cattle might go, an action could hardly be maintained on the bond for the breach.

In my opinion, under the evidence in this case, the judgment of the circuit court was well sustained, and it is accordingly affirmed. All concur.

BIRNEY v. SHARP, *Appellant.*

1. **Practice in the Supreme Court:** INSTRUCTIONS: PRESUMPTIONS. The record did not contain the instructions given on behalf of the plaintiff: *Held* that, in their absence, it was impossible to determine whether or not error had been committed in refusing those asked by the defendant; and that, in such case, the presumption would be in favor of the propriety of the action of the trial court.

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2. ——: IMMATERIAL EVIDENCE: WEIGHT OF EVIDENCE. The Supreme Court will not reverse because of the admission of incompetent evidence where it is seen to be immaterial; and, where there is evidence to support the verdict, will not disturb the same upon the mere weight of evidence.

*Appeal from Schuyler Circuit Court.—Hon. ANDREW ELLISON,
Judge.*

AFFIRMED.

J. M. Knott and James Raley for appellant.

Higbee & Shelton for respondent.

RAY, J.—The petition charges that, in May, 1877, plaintiff contracted with defendant for the sale of, and sold to defendant, sixty merchantable fat hogs, to be delivered in Queen City, Schuyler county, on any day from the 20th day of November next thereafter to the 10th day of December, inclusive, at the option of the defendant—he to notify plaintiff on which of said days, from the 20th day of November to the 10th day of December, to deliver said hogs—said hogs to average not less than 250 pounds, for which defendant agreed to pay plaintiff five cents per pound on delivery as aforesaid; and plaintiff says that defendant, then and there paid plaintiff \$5 on said contract, as earnest money and in part payment, which was accepted by plaintiff accordingly; that plaintiff at all times during said period between the 20th day of November and the 10th day of December, inclusive, was ready and willing to deliver said hogs to defendant pursuant to said contract, and during said period plaintiff requested defendant to inform him on what day he would receive said hogs, but defendant refused to name any day for such delivery, and failed to notify plaintiff when to deliver the same; and that, during said period, to-wit, on the 10th day of December, 1877, during usual business hours, and before sunset of that day, plaintiff tendered to defendant and offered to deliver to him, in

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Queen City aforesaid, sixty merchantable fat hogs averaging 250 pounds, but defendant refused to receive them; that said hogs then weighed 15,821 pounds, and the sum then due plaintiff therefor was \$786.05; that said hogs were then worth in the market only three and a half cents per pound, at which price he sold said hogs, receiving therefor \$553.73. Wherefore plaintiff says he is damaged in the sum of \$233.32 by the default of defendant, in failing to receive and pay for said hogs, for which amount, with interest and costs, he asks judgment.

The second count of said petition, in all respects, set out the same transaction, or cause of action, except that the second count contained the following averment, the first part of which is not included in the first count: "That by the custom of the country in contracts for the sale and future delivery of hogs and other live stock, the 10th day of December, 1877, was included as one of the days for the delivery of said hogs, as defendant well knew, and as considered at the time of making said contract, and in fact, according to the understanding and intention of the plaintiff and defendant said day was so included."

The answer of defendant is: 1st, A general denial; 2nd, Then charges that in May, 1877, plaintiff sold and agreed to deliver to defendant, and defendant purchased and agreed to receive and pay for one car load of smooth, straight, merchantable fat hogs, to average not less than 250 pounds, for the price of five cents per pound, to be paid for on delivery at Queen City at any time between the 20th day of November and the 10th day of December following, at the option of plaintiff, and defendant then paid plaintiff \$5 on the contract to bind the bargain, which was received accordingly. And defendant says that he was at all times, between the 20th day of November and the 10th day of December, ready and willing to receive and pay for said hogs, but that plaintiff at no time between said days delivered, or tendered the delivery of said hogs to defendant, but failed and neglected so to do, to the damage of

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defendant of the sum of \$5, for which he asks judgment.

The reply to this answer was a general denial of all of said new matter so stated.

There was a trial before a jury, who found the issues for the plaintiff, and judgment was rendered accordingly, from which the defendant, after an unsuccessful motion for a new trial, appealed to this court.

It appears from the bill of exceptions that at the trial the plaintiff offered evidence tending to sustain the issues on his side, and that the defendant also offered evidence tending to sustain the issues on his part, and also objected to evidence of plaintiff to prove the custom in that locality set up in the second count of the petition. At the close of the testimony, the court, over the objection of the defendant, gave six or seven instructions for plaintiff, none of which, however, are preserved in the record, the clerk certifying that they could not be found, and had been lost by counsel. The court, also, refused four or five instructions asked by the defendant, which it is unnecessary here to insert, in the absence of those given for the plaintiff.

The defendant claims a reversal: 1st, On the ground of error in giving and refusing said instructions; 2nd, On the ground of error in receiving evidence offered by plaintiff to establish the custom, in that locality, in reference to contracts of the description of the one in question.

On the first point, it is manifestly impossible, in the absence of the instructions given for the plaintiff, for the

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sumptions. court to determine whether they were right or wrong. In such cases all the presump-

tions are in favor of the correctness of the ruling of the trial court. In their absence and without knowing what points have been ruled and how, it is equally impossible to determine whether it was error in the court to refuse the instructions asked by defendant. They may, from aught that appears, have covered the same ground, and been embraced in those already given for the plaintiff, and refused for that reason. Without the entire record

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before us, we cannot say that the court erred in this particular. In such cases, also, the presumptions are in favor of the propriety of the action of the lower court.

As to the second point, it is perhaps sufficient to say that, conceding that the evidence of custom, offered by 2. — : immaterial plaintiff, was incompetent, yet, as the evidence of the plaintiff tended to show it was the distinct agreement and understanding of the parties, at the time, that both the 20th day of November and the 10th day of December were included in the days within which said hogs might be delivered, the alleged custom of the country, in that behalf, became and was wholly immaterial, and the ruling of the court, in that particular, under the facts of this case, furnishes no sufficient cause for reversal. The contract in this case being altogether verbal, it and its fulfillment or non-fulfillment, were all matter of evidence, submitted to and passed upon by the jury; and the uniform practice of this court, when there is evidence to support the verdict of the jury, not to disturb the same, on the mere weight of evidence, is too well settled to require any citation of authority on this point.

For these reasons the judgment of the circuit court is affirmed. All concur.

THE STATE v. EMERY, *Appellant.*

Manslaughter in the Fourth Degree. Under the statute, (R. S. 1879, § 1250,) the shooting of a human being unintentionally, but through negligence in handling a fire-arm such as to indicate carelessness or recklessness incompatible with a proper regard for human life, is manslaughter in the fourth degree.

*Appeal from Moberly Common Pleas Court.—Hon. G. H.
BURCKHARTT, Judge.*

AFFIRMED.

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Reed & Hall for appellant.

D. H. McIntyre, Attorney General, for the State.

SHERWOOD, J.—The defendant was indicted for murder in the second degree. On trial he was found guilty of a less offense, to-wit, manslaughter in the fourth degree, and his punishment assessed at two years in the penitentiary. The evidence shows that the defendant, within a few moments before the fatal occurrence, had been brandishing a self-cocking and loaded revolver in his saloon, endangering the lives of those who were there. He was warned of the danger of such actions, and once, when his pistol dropped on the counter, a bystander picked it up and put it in his pocket ; but on defendant's promise to put the pistol up, it was returned to him. In a few moments afterward, however, while flourishing the pistol again, it was discharged, resulting in the death of Hammond, a friend, it seems, of the defendant, who had just come into the saloon.

The statute provides: "Every other killing of a human being by the act, procurement or culpable negligence of another which would be manslaughter at the common law, and which is not excusable or justifiable, or is not declared in this chapter to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree." R. S. 1879, § 1250.

The first and sixth instructions given for the State, correctly declare the law, and taken together, announce this doctrine: That in order to find a person guilty of manslaughter in the fourth degree, it is sufficient to show that the shooting, though unintentionally done, was the result of negligence in handling the fire-arm, indicating on the part of such person a carelessness or recklessness incompatible with a proper regard for human life.

Mr. Bishop says: "There is little distinction, except in degree, between a positive will to do wrong and an in-

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difference whether wrong is done or not; therefore, carelessness is criminal." Thus, if a person by careless or furious driving unintentionally run over another and kill him, it will be manslaughter; or, if one in command of a steamboat, by negligence or carelessness unintentionally run down a boat and a person therein is thereby drowned, the act is manslaughter. 1 Bishop Crim. Law, §§ 313, 314. Or if a person points a gun without examining whether it is loaded or not, and it happens to be loaded and death results, he is guilty of negligence and manslaughter. *Reg. v. Jones*, 12 Cox C. C. 628. So, also, if death ensue from discharging a loaded gun at night into the public highway, whether any person were in sight or not, the act being one of gross carelessness, calculated to endanger the lives of persons passing along the street. *People v. Fuller*, 2 Parker Crim. Rep. 16. In another case a revolver was found in the road with one load in it. Six months thereafter repeated attempts failed to discharge it or to remove the load. Over four years thereafter the defendant, in sport, endeavoring to frighten a woman with the revolver, it was discharged and killed her, and the defendant was held rightly convicted of manslaughter. *State v. Hardie*, 47 Iowa 647. These authorities abundantly support the instructions we have commented on; but none of them show such a degree of carelessness and disregard of consequences as that exhibited by the facts in evidence in this record.

But it is insisted that the point whether the killing was accidental was not submitted to the jury by the instructions. This position is the result of a gross misconception of the sixth instruction already noticed. By it the jury were told if the shooting "was not intentionally done, but was the result of defendant's negligence," etc. Thus, in effect, telling the jury that the shooting was accidentally done; *vide Webster Dict.*, "Intentional." It is also insisted that the statute only makes "culpable" negligence punishable when resulting in homicide. But such negligence as the defendant exhibited was culpable or criminal, both in

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the sense of the lexicographers and of the law writers. "Culpable negligence is the omission to do something which a reasonable, prudent and honest man would do, or the doing something which such a man would not do under all the circumstances surrounding each particular case." Shearman & Redfield on Neg., § 7. It was unnecessary that the instructions should contain the word "culpable;" it was sufficient that they conveyed to the minds of the jury other and equivalent words expressive of the idea of culpability. As the instructions given for the State correctly declare the law on the subject of negligence and its punishment, it becomes unnecessary to consider other instructions asked on the same subject by the defendant.

We are not aware that any one heretofore in this State has been prosecuted for manslaughter upon circumstances similar to those which the record presents. And yet, if we may judge from the reports of the daily press, instances are not infrequent within our borders where human lives are sacrificed by playful carelessness in handling fire-arms.

Finding no error in the record, we affirm the judgment.
All concur.

SHATTUCK V. PHILLIPS, Treasurer of Pike County, Appellant.**Division of School District, lying in two or more Counties.**

Section 7027, Revised Statutes 1879, provides that a school district lying within two or more counties may be divided, where a majority of the qualified voters residing in the fractional portion of such district within either county, desire to attach themselves to an adjoining district within their own county, or to form a separate district; *Held*, that a vote of such qualified voters upon a proposition to withdraw from that part of the district lying outside their own county was ineffectual to divide such district, when no vote was taken to unite with an adjoining district, or to form a separate district.

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Appeal from Pike Circuit Court.—Hon. G. PORTER, Judge.

AFFIRMED.

Robinson & Smith for appellant.

Fagg, Reynolds & Fagg for respondents.

MARTIN, C.—The plaintiffs on the 5th day of September, 1879, as school directors filed their petition for the writ of mandamus against the defendant as county treasurer of Pike county.

It appears from the evidence that School District No. 1, township 52, range 5, west, was composed of territory lying in both Audrain and Pike counties. The school house was located in Audrain county and had been destroyed by fire. The insurance upon it in the sum of \$213 had been collected from the insurance company and deposited with the defendant in his capacity as treasurer. The directors of the district desiring to rebuild the school house drew their warrant upon the treasurer for that purpose. He declined to pay, whereupon they made their application for the writ of mandamus to compel him to pay. An alternative writ was issued on the petition. In his return to the writ the defendant denied all right in the plaintiffs to draw the warrant and all obligation on his part to pay it. The trial resulted in a judgment for the plaintiffs, from which the defendant has appealed.

The defense urged by the treasurer at the trial consisted of a certain record of an election, by which it was claimed that the district had been divided under section 7027, Revised Statutes 1879. If this defense is satisfactorily established, the defendant was justified in refusing to pay the money over to the directors of the old district. In the event of a division, the school property of the district must be divided and apportioned to the two divisions according to law, and the order of a board of directors which had

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ceased to represent the whole district, or to own the whole fund, would not be obligatory upon him.

The record of the election which it was claimed had effected a division of the district, reads as follows: "The qualified voters of that part of School District No. 1, township 52, range 5, west, which lies in Pike county, met at the residence of E. G. Glover, in said district, on the 31st day of January, 1879, pursuant to notice posted, and at the hour of two o'clock p. m. organized by electing S. T. Noell, president, and John Reading, clerk of said election. Whereupon the polls were by the president declared to be open, when the qualified voters proceeded to vote for and against withdrawing from that part of said school district which lies in Audrain county, depositing the following styled ticket: 'Division on county line, Yes.' 'For dividing, No.' Then follow the names of the voters numbering twenty-six, after which appears the footing or result, in these words: 'Yes, 14—No, 12.'"

There was evidence tending to show satisfactorily enough that the following notice had been posted in three public places in the school district on the 9th day of January, 1879, and was signed by eighteen or nineteen qualified voters of the district:

NOTICE.—"The qualified voters of that part of School District No. 1, township 52, range 5, west, being in Pike county, are hereby notified that an election will be held at the residence of E. G. Glover, on the 31st day of January, 1879, for the purpose of voting on the proposition to separate that part of School District No. 1, township 52, range 5, west, which lies in Pike county, from that part of said district which lies in Audrain county, said election to commence at two o'clock and close at four o'clock on said day."

There is no evidence in the record of any subsequent proceedings at this meeting or any other meeting of the voters in which it was decided whether they would attach themselves to some adjoining district or create a new dis-

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trict out of that portion of the territory of the old district which lay in Pike county.

The single question of importance in the case is, whether these proceedings were sufficient in law to effect a division of the district under section 7027. And this brings us to consider the import and meaning of that section, which reads as follows:

"Whenever any school district or districts shall be divided by county lines, and a majority of the qualified voters residing in either fractional part thereof may desire to attach themselves to an adjoining district within their own county, or form a separate district, they shall hold an election for that purpose, first giving twenty days notice by posting up printed or written handbills in three of the most public places in such fractional district, stating the time, place and object of the election; and if a majority of the votes cast at such election be in favor of uniting themselves to an adjoining district in their own county, or forming a separate district, they shall notify the district clerks of the districts interested of the result of the election; and if it is desired by such fractional district and a portion of the adjoining district to form a new district, it shall be the duty of such adjoining district school board to so change their boundary lines as may be agreeable to the inhabitants interested therein, and notify the county clerk and county commissioner of the change so made; but if such division cannot be so made by the district board, or if they refuse or neglect to act, when notified of such desire, they may appeal to the county commissioner, who shall proceed to ascertain the facts in the case, and locate the boundaries of such new district as appears to be just and proper, and to the best interest of the inhabitants interested therein—such new district to be governed as hereinbefore provided in forming new districts; provided, that if a school house has been located and built by a district thus divided by a county line, and that portion of the district desires to withdraw in which the school house has been located and built, they

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shall first pay to the portion of the district situate in the adjoining county their *pro rata* share of the value of such school house." R. S. 1879, § 7027.

In construing this section it will be observed that the division authorized by the statute can be effected only by a majority vote, and that this vote is to be taken upon the question of attaching the fractional part of the district voting, to some adjoining district, or of forming a separate district out of it. The language of the act in this respect is very clear and expressive: "And if a majority of the votes cast at such election be in favor of uniting themselves to an adjoining district in their own county, or forming a separate district, they shall notify the district clerks of the districts interested in the result of the election." Now it is apparent from an inspection of the minutes of this election that the proposition of the section required to be decided by a majority vote was not voted upon at all. The minutes of the meeting inform us that "the voters proceeded to vote for and against withdrawing from that part of said school district which lies in Audrain county." Neither at that or any subsequent meeting does it appear that the voters were in favor of attaching themselves to an adjoining district or forming a new district to be entirely in Pike county. No vote to unite with an adjoining district, or form a separate district, has ever been taken. No boundary lines of any new district can be determined upon as the matter stands at present; nor can any interested district be notified of a result affecting them. How can any one upon the strength of this vote certify that a majority of the voters were in favor of uniting themselves to an adjoining district or forming a separate one? Which of these results could any one certify from this vote? The desire to form a separate district or unite with an adjoining one necessarily implies a separation or withdrawal from the old district. But the desire to separate and withdraw does not imply or contain the desire to unite with another district or create a new one. The act of separation as a dis-

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tinct act is not contemplated in the section. It is authorized only as incident to the desire and act of uniting with another district or forming a new one. To effect a legal division of the district the statute must be complied with. The vote and notice of the vote must comply with its requirements. As the vote in this case fails to comply with either the letter or spirit of the statute, the district must be regarded as remaining undivided. This leaves the directors of the old district in full power and authority as if no division had been attempted. Their authority must continue unimpaired until terminated or limited by a legal division. Accordingly the funds of the district in the hands of the treasurer remained there subject to the lawful warrant of the directors, which the treasurer should have recognized and paid. The judgment is affirmed. PHILIPS, C., concurs; WINSLOW, C., absent.

THE CITY OF MARSHALL, Plaintiff in Error, v. ANDERSON.

1. **Husband and Wife : DEDICATION TO PUBLIC USE.** The dedication to public use of the wife's land by the husband will not be effectual, even as to his courtesy, unless she join in the conveyance and acknowledge the same in the manner provided by law.
2. **— : — : ESTOPPEL IN PAIS.** Where the husband alone files a plat of his wife's land, their joint conveyances thereafter of lots designated on such plat will create no estoppel in *pais* against her, in favor of the public, to assert title to land designated on the plat as a street.

Error to Saline Circuit Court.—Hon. Wm. T. Wood, Judge.

AFFIRMED.

C. T. Shannon and Leslie O'rear for plaintiff in error.

Boyd & Sebree and W. D. Bush for defendant in error.

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PHILIPS, C.—Action of ejectment. It appears that Martha J. English, a married woman, owned the land in controversy. It was her legal estate. In 1867, her husband, M. English, made a plat of this land as an addition to the town of Marshall, and filed it in the recorder's office of said county. The wife did not join in this act. On this plat was indicated a street designated "Dahlgreen avenue." After this Mrs. English joined her husband in deeds of conveyance of several lots named in said plat. Dahlgreen avenue was not named in any of these deeds. There seems to have been but little, if any, improvement on any of the lots prior to May, 1871, and this piece of ground was a common with no special traveled way over it. At the May term, 1871, of the Saline county court, M. English presented his petition to that court asking to abolish Dahlgreen avenue and throw the street over west on the boundary of another addition. At the August term following this petition was granted and order made. After this M. English made out and filed another plat of this ground showing other cross streets and throwing what was marked "Dahlgreen avenue" on the first plat into lots. Mrs. English joined in this last plat. The city during this time assessed and collected taxes on this ground where Dahlgreen avenue was. The defendant Anderson, by mesne conveyances from English and his wife, became the owner of a lot covering a portion of the ground once marked "Dahlgreen avenue" and built a residence thereon and occupied the same as such. After the lapse of years the town of Marshall, having been organized into a city of the fourth class, instituted this action to eject Anderson, claiming this lot as a part of Dahlgreen avenue, on the ground that the street had been dedicated to the town, and that the order of the county court vacating it was a nullity. The court sitting as a jury, found the issues for the defendant, and the plaintiff brings the case here on appeal.

As the plaintiff asserts title to the real estate in con-

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troversy through dedication to the town for public use, if ^{1. HUSBAND AND} there was no effectual dedication this action ^{WIFE; dedication to} ^{public use.} must fail. It is conceded that when its alleged title accrued, Martha J. English owned this land in fee. She was a married woman and she held the title as a legal estate. No deed or act of her husband alone could work a divestiture of her title. 2 Wag. Stat., § 14, ch. 94, p. 935. To effectuate this she must join in the deed of the husband "acknowledged by her in the manner now provided by law." This provision of the statute would wholly fail of its beneficent purpose, if the husband by filing a plat of her land could dedicate it in perpetuity to the public. If he could give it to an aggregation of people, he could deed it to an individual. Neither his courtesy nor other *jus mariti* could authorize a dedication to public use, so as to obstruct her *jus disponendi*, her husband joining in the deed. The object of the statute was to prevent the husband's courtesy during coverture from being disposed of without the consent of the wife, and to secure this interest to their joint enjoyment. *Huff v. Price*, 50 Mo. 230.

The fact that she joined her husband in making deeds to lots designated in the original plat, creates no estoppel.

^{2. — : — : es.} As to such an estate a *femme covert* cannot ^{toppel in pais.} be estopped by any such act *in pais* from asserting the true title. This whole question is, as I conceive, settled adversely to the plaintiff's pretension set up in this case, by the case of *McBeth v. Trabue*, 69 Mo. 642. See also *Goff v. Roberts*, 72 Mo. 570. The instructions given by the court in respect of the effect of the alleged dedication were in conformity with the law, and justified the verdict.

In this view of the law it is unnecessary to pass on the questions raised and so ably discussed by counsel as to the effect of the proceedings in the county court resulting in an order abrogating Dahlgreen avenue. I entertain grave doubts as to the validity of that order founded on the petition presented to the court, in that it failed to give

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"the names of the persons to be affected thereby." The question in my mind is whether this is not, under section 45, page 1321, Wagner's Statutes, a jurisdictional fact. On this, however, I reserve an expression of opinion. The judgment of the circuit court is affirmed. All concur.

THE CITY OF CALIFORNIA V. HOWARD, Plaintiff in Error.

1. **Dedication to Public Use.** The plat in evidence in this case examined and *Held* to amount to a dedication of certain parcels of land to public use.
2. **Ejectment: FOR PUBLIC STREET.** A city invested by law with the title in fee and the right and control over all public streets, may maintain ejectment for land dedicated for a street.

Error to Moniteau Circuit Court.—HON. E. L. EDWARDS,
Judge.

AFFIRMED.

The following was the plat offered in evidence.

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Moore & Williams for plaintiff in error.

L. F. Wood and *Draffen & Williams* for defendant in error, cited *Hanson v. Eastman*, 21 Minn. 509; *Rowan v. Portland*, 8 B. Mon. 239; *Memphis, etc., Packet Co. v. Gray*, 9 Bush 146.

HOUGH, C. J.—This is an action of ejectment to recover possession of a certain parcel of ground lying within the corporate limits of the city of California, and claimed by the city to have been dedicated by the owners thereof to public use.

It appears from a plat offered in evidence, the original of which was duly deposited with the recorder of the county in 1854, by the defendant and one ^{1. DEDICATION TO} _{PUBLIC USE} Smith, that an addition to the then "town of California" was laid out on ground lying on both sides of the track of the Pacific railroad, which, at this point runs nearly east and west, which addition was subdivided into blocks and lots, with streets and alleys, and that an open space, not divided into lots, extending perhaps 1,200 feet east and west through the entire addition, was left on either side of and adjoining said railroad track, and between the lots in said addition. We infer from the testimony that the portion of this open space lying on the south side of the track is about 130 feet wide, north and south, and that on the north side is about 80 feet wide, north and south. The parcel sued for is part of the strip on the south side. It further appears from the plat that there are fifteen lots on the north side, and the same number on the south side, abutting upon this open space, and that those on the south side are otherwise inaccessible save by an alley in the rear thereof. Four streets running north and south through the subdivided portion of the addition on the north and the subdivided portion of said addition on the south, connect with said open space, and in connection with it form straight and continuous avenues

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from the northern to the southern boundary of said addition, and so far as this plat shows, there is no means of going from the north to the south side of said addition along said streets, without crossing said open space. No writing or other mark appears upon the open space mentioned, expressive of the object of the proprietors in leaving it open and undivided. The names of the streets appear in the spaces intended for streets, in the part of the addition north of the railroad, and the designation "street" appears in similar spaces in that part of said addition which is south of the railroad, showing conclusively, we think, that the purpose of the proprietors was to make these streets continuous.

The circuit court held that the facts appearing from the face of the plat constituted a dedication of said open space to public use, and refused to hear oral testimony showing a different intention on the part of the proprietors who filed the plat. We are of opinion that the facts stated are sufficient to constitute a dedication to public use for the purposes of a highway or a common, and that the circuit court committed no error in its ruling.

It is objected by the defendant that the city has no such interest in the premises in controversy as will entitle ^{2 EJECTMENT: for} ~~public street,~~ it to maintain this action. The act of 1845, under which the plat was filed, vested the fee of all the lands dedicated to public use, in the county. The act incorporating the plaintiff, includes the addition of Howard & Smith within its corporate limits, and confers upon it "the right and control over all public streets, public grounds (and) public buildings within the corporate limits." Acts 1857, p. 364, § 5. In such cases the right of use and control is regarded as a legal and not a mere equitable right. 2 Dillon Munic. Corp., (3 Ed.) § 662; *City of Hannibal v. Draper*, 15 Mo. 634; *M. E. Church v. Hoboken*, 33 N. J. L. 13.

The judgment of the circuit court is affirmed. All concur.

Perriuez v. The Missouri Pacific Railway Company.

PERRIQUEZ V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

1. **Railroads: KILLING CATTLE: COMPLAINT.** In an action under the 43rd section of the Railroad Law, (R. S. 1879, § 809,) the complaint should negative any reasonable inference that the injury complained of may have occurred at a point where the law does not impose any obligation on the company to fence; but it need go no further. Thus it need not be expressly averred that the place where the animal entered on the road was not within the limits of an incorporated town or city; an averment that it was at a point where the road runs along or adjoining uninclosed fields, will be sufficient.
2. — : — : — . The complaint in such an action alleged that plaintiff's cow "was crippled and got on the railroad at a point where the same runs along or adjoining uninclosed fields and lands, and where the same was not fenced with a good and lawful fence, and not at the crossing of any public highway." Held, that this sufficiently showed that the injury resulted from the company's failure to build a fence.

Appeal from Osage Circuit Court.—HON. A. J. SEAY, Judge.

AFFIRMED.

T. J. Portis and Smith & Krauthoff for appellant.

Belch & Silver for respondent.

PHILIPS, C.—Action for double damages for killing cow named "Doodle," instituted before a justice of the peace in Osage county, upon the following statement:

"Plaintiff for his cause of action against the defendant, alleges that the defendant is and was at the time hereinafter referred to, a corporation duly organized under and by virtue of the laws of the State of Missouri under the corporate name of the Missouri Pacific Railway Company. Plaintiff further states that said defendant, by its agents, officers and servants, in conducting, managing and running a locomotive engine and train of cars on its said road, did, on the 6th day of May, 1879, in Linn township,

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Osage county, State of Missouri, run over and cripple a certain cow belonging to this plaintiff, thereby making said cow totally and entirely valueless to plaintiff, which said cow was about four or five years old, of a red and white color, and known by the name "Doodle," to the plaintiff's damage of the sum of \$20; that said cow was crippled and got on the railroad of said defendant at a point where the same runs along or adjoining uninclosed fields and lands, and where the same was not fenced with a good and lawful fence, and not at the crossing of any public highway. Wherefore plaintiff says an action has accrued to him and asks judgment in double damages so sustained, to-wit: the sum of \$40, and costs."

A motion to dismiss upon the ground of the insufficiency of this statement having been overruled, after appeal to the circuit court, the defendant excepted. Upon the trial in the circuit court there was a verdict for the plaintiff, the amount of which was on motion of plaintiff doubled, and judgment rendered accordingly, and the defendant's motions for a new trial and in arrest of judgment overruled, to all of which rulings the defendant excepted, and thereupon brings this case here by appeal.

The single question presented by this record is as to the sufficiency of the statement. It is objected that it does not allege that the point at which "Doodle" is averred to have entered upon the railroad, was not within the limits of an incorporated city or town, nor that the killing was in anywise the result of or occasioned by any failure on defendant's part to construct a fence.

It is not essential to the validity of a statement under the 43rd section in question, that it should be affirmatively averred, that the point of entry on the road was not within the limits of an incorporated town or city. What this court has held touching this issue is, that there must so much appear to fix the liability as to negative a reasonable inference that the injury may have occurred at a point where the law does not impose any obliga-

1. RAILROADS : kill- averred, that the point of entry on the road
ing stock: com- plaint.

Perriuez v. The Missouri Pacific Railway Company.

tion on the defendant to fence. In other words, if from the statement it is as reasonably inferable that the point where the animal entered on the road may have been where the railroad was under no duty to fence, as where the law requires it to fence, the statement is bad. This is what was held in *Rowland v. R. R. Co.*, 73 Mo. 619; *Sloan v. Mo. Pac. Ry Co.* 74 Mo. 47, and *Bates v. St. Louis, I. M. & S. Ry Co.*, 74 Mo. 60. But the statement under review here does negative the presumption that it might have occurred in an incorporated town or city; for it is distinctly averred "that said cow was crippled and got on the railroad of defendant at a point where the same runs along or adjoining unin-closed fields and lands."

Nor do we think the objection well taken that it does not sufficiently appear that the injury resulted from defendant's failure to construct a fence. It is in effect averred that the cow got on the railroad and was crippled at a point where defendant had neglected its duty to fence. This allegation is quite as full as that of *Edwards v. Kansas City, St. Jo. & C. B. R. R. Co.*, 74 Mo. 117, in which HOUGH, J., observes: "There is no express allegation that the cow got upon the track in consequence of the failure of the defendant to erect or maintain fences and cattle-guards as required by the statute; but we think the averment quoted, if not equivalent to such an allegation, will at least warrant an inference that the cow got upon the track by reason of the failure to fence. See also *Kronski v. Mo. Pac. Ry Co.*, 77 Mo. 362; *Farrell v. Union Trust Co.*, 77 Mo. 475.

The judgment of the circuit court is, therefore, affirmed.
All concur.

Vance v. Corrigan.

VANCE et al., Appellants, v. CORRIGAN.

Special Tax Bill: SUIT AGAINST RECORD OWNER: SALE PASSES TITLE OF TRUE OWNER. Where the statute under which a special tax bill was issued required the suit for its enforcement to be brought against "the owner" of the land to be charged; *Held*, that in the absence of any knowledge or notice to the contrary, the holder of the bill had the right to assume that the person in whom the records showed the title to be vested, was the true owner, and to sue accordingly; and that a sale under execution upon a judgment against the record owner passed the title as against the grantee in an unrecorded deed from him, provided the purchaser had no notice of the unrecorded deed.

Appeal from Jackson Circuit Court.—Hon. S. H. Woodson, Judge.

AFFIRMED.

Pratt, Brumback & Ferry for appellants, argued that Mrs. Vance and not Barnes was the owner, citing Cooley on Tax., (1 Ed.) 278, 279; Blackwell on Tax Titles, (3 Ed.) 144, 145; *Trustees v. Boston*, 12 Cush. 59; *Shaff v. Improvement Co.*, 57 N. H. 110; *Proctor v. R. R. Co.*, 64 Mo. 123; *Hartford v. Brady*, 114 Mass. 470; *s. c.*, 19 Am. Rep. 377; *United States v. Villalonga*, 23 Wall. 35; *Davis v. Dodds*, 20 Ohio St. 473.

Jno. C. Tarsney for respondent.

HOUGH, C. J.—This is an action of ejectment to recover the north half of lot 29 in Swope's addition to the City of Kansas. The petition is in the usual form, and the answer is a general denial. The case was tried by the court upon an agreed statement of facts from which it appears that on the 28th day of August, 1865, George W. Barnes, of Ohio, who was then owner in fee of the land in controversy by virtue of a certain deed to him then of record, conveyed the same to Sarah A. Vance, also of Ohio. The deed to Sarah Vance was not recorded until the 25th day of September, 1876.

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On March 1st, 1872, a special tax bill was issued by the City of Kansas and delivered to Dwyer & O'Neil, for a plank sidewalk constructed by them, in front of said lot, under a contract with said city. Suit was brought in 1873 to enforce the lien of said special tax bill, and publication was duly made against George W. Barnes as the owner of said lot, and on the 18th day of September, 1873, judgment was regularly rendered in favor of the plaintiff in said suit for the amount of the tax bill and interest, and special execution was awarded for the enforcement of said judgment. Execution was duly issued under said judgment and the sheriff levied upon and sold thereunder "all the right, title and interest" of the defendant Barnes, in and to the north half of said lot, to Edward Corrigan, the defendant herein, for \$79.95, and executed to him a deed reciting the judgment, execution, levy and sale, and conveying to him "all the right, title, interest and estate of the said George W. Barnes, of, in and to the above described real estate" that he "might sell as sheriff as aforesaid, by virtue of the execution and notice. To have and to hold," etc. Sarah A. Vance died intestate, September 26th, 1876, leaving appellants, other than the husbands of the female appellants, her sole heirs at law. Neither Barnes nor Sarah A. Vance ever had actual possession of the lot. There is nothing to show whether or not Corrigan had any knowledge or notice of the deed of Barnes to Vance, or of the latter's ownership of the land prior to the record of her deed, or to show whether or not Sarah A. Vance had any knowledge or notice of the existence of the special tax bill for sidewalk, or the suit thereon, until after Corrigan received his deed from the sheriff.

The question is, did the deed of the sheriff to the defendant pass the title to the lot in controversy, as against the unrecorded deed of plaintiffs' ancestor?

It is the settled law of this State, that a purchaser at execution sale, is a purchaser from the judgment debtor, within the meaning of the recording act. *Draper v. Bryson*, 26 Mo. 108. If, therefore, the defendant had purchased the

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land under an ordinary judgment against Barnes, there could be no question but that he would take the title as against the unrecorded conveyance from Barnes to Sarah Vance. *Davis v. Ownsby*, 14 Mo. 170; *Valentine v. Harener*, 20 Mo. 133; *Stillwell v. McDonald*, 39 Mo. 282; *Potter v. McDowell*, 43 Mo. 93; *Reed v. Ownby*, 44 Mo. 204; *Black v. Long*, 60 Mo. 181; *Fox v. Hall*, 74 Mo. 315. We are called upon to decide, therefore, whether there is any difference between the effect of a sale under execution for the enforcement of the special tax bill in question, and a sale under ordinary executions.

The charter of the City of Kansas provides that all suits to enforce special tax bills, shall be brought against the owner of the land, and preliminary thereto, the city engineer is required to assess the cost of the work done, as a special tax against the property chargeable therewith, and to make out a certified bill of such assessment against said property, in the name of the owner, and such certified bill is declared to be *prima facie* evidence of the liability of the person therein named, as the owner of such property. Acts 1870, p. 343 *et seq.* Now, it is quite evident that unless the *prima facie* case as to ownership, made by the tax bill, is overcome by proof at the trial, the court in which the suit is pending to enforce the tax bill, will be authorized to render judgment for the sale of the property. No personal judgment can be rendered against the owner, even if personally served; *City of Louisiana v. Miller*, 66 Mo. 467; and the chief object in having the owner brought in would seem to be to enable him to contest the validity of the proceedings as a charge upon his property, and to discharge the lien, if he so desires, without sale thereof.

In making sale of the property, and in executing a deed therefor, it is the duty of the sheriff, in the absence of any special provision to the contrary, to conform to the general law governing the sales of real property in ordinary proceedings, and in such cases it is the established rule that the sheriff shall sell and convey only the right, title and

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interest of the judgment debtor. This is all, indeed, that the sheriff can sell and convey, for it is the judgment debtor's interest in the land, only, which is subject to execution. Now, if the defendant in the execution was in reality the owner of the land, the sale would undoubtedly pass his title; and if he appears by the record, at the time of the sale, to be the owner of the land, the interest or estate in the land, of which his deed shows him to be seized, is subject to sale, and the purchaser of such interest at such sale, will acquire the same under the registry act, unless such interest had been conveyed or incumbered, and the purchaser had notice thereof. *Fox v. Hall, supra.* The registry act provides that no conveyance of land "shall be valid, except between the parties thereto and such as have actual notice thereof, until the same shall be deposited with the recorder for record." R. S., § 693.

We are unable to perceive why the city engineer in making out a special tax bill, and the owner thereof in suing to enforce the same, may not rely upon the statutory declaration, that the record owner is to be regarded as the real owner, unless they have notice to the contrary. It is unnecessary to discuss in this connection the force and effect of a tax bill fraudulently made out by the engineer in the name of one whom he knew not to be the owner, or of the effect of a suit fraudulently instituted by the owner of the tax bill against one known not to be the owner, as these questions do not arise in this case. Unless the engineer has knowledge of the true owner, he must rely upon the record of deeds, in making out the tax bill. So, also, must the owner of the tax bill, in instituting suit, rely upon such record. The statute is general in its terms and is equally applicable to all persons, natural and artificial, private and official.

We are of opinion that the provision of the charter requiring the suit to be brought against the owner of the land, does not mean that it must, in order to render the judgment valid, be brought against the real owner, although

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holding by an unrecorded conveyance, but it means that suit must be brought against the person appearing, by the registry of deeds to be the owner, in the absence of notice to the contrary. The proceeding is really against the land, although a personal defendant is necessary to the validity of the proceeding, but no personal judgment can be rendered in the suit, and it is sufficient to proceed against the record title when the true owner is unknown. We are also of opinion that a purchaser at a regular execution sale under a judgment duly rendered in such suit, will acquire the same rights which he would acquire by purchase from the execution defendant. If Corrigan had notice of the Vance title, the burden was on the plaintiffs to show it.

Perceiving no error in the record, the judgment of the circuit court will be affirmed. The other judges concur.

THE STATE *ex rel.* BUENEMAN v. KURTZEBORN *et al.*, *Appellants.*

Duration of Liability of Sureties on Constable's Bond. Where by statute a constable's term of office is two years and until his successor is elected and qualified, the liability of the sureties on his bond will continue after the expiration of the two years and until his successor is elected and qualified.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Section 2 of the special act of 1875, referred to in the opinion, provides: "All constables now in office in the county of St. Louis, shall hold their respective offices until the general election to be held in the year 1878, and until their successors are duly elected and qualified." Section 8 of article 14 of the constitution of 1875, provides: "Nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

The State ex rel. Bueneman v. Kurtzeborn.

Louis Gottschalk for appellants.

Finkelnburg & Rassieur for respondent.

SHERWOOD, J.—Action on a constable's bond. The constable was elected in November, 1874, and his term consequently expired, under statutory provisions, two years thereafter, or in November, 1876. But under another statutory provision, he continued in office, until his successor was elected and qualified. Wag. Stat., 963, § 1. The conversion of the money collected occurred, according to the petition, January 28th, 1877, and this suit was brought January 6th, 1879. Under the section just mentioned, Kurtzeborn's term of office did not expire until his successor was elected and qualified. He, therefore, continued to be constable, and his sureties to be bound, up to the time he converted the money collected; for the provisions of the law just cited are to all intents and purposes, as much part and parcel of the bond, as if so nominated therein. The statute of limitations had, therefore, not run at the time this suit was brought.

What effect the special act of 1875, (Sess. Acts 1875, p. 29,) had, it is unnecessary to inquire. If it violates section 8 of article 14 of our constitution, it is of course a nullity, and accomplishes nothing. If, on the contrary, the act is in accord with section 8, still Kurtzeborn, though appointed by legislative enactment, had not "qualified" under his new appointment, and so his sureties remained bound as before. These views, as to the continuing liability of the sureties, coincide with those expressed in *Long v. Seay*, 72 Mo. 648, our latest adjudication on the point. Therefore, judgment of the court of appeals affirmed. All concur.

Morehouse v. Ware.

MOREHOUSE, Administrator de bonis non, v. WARE et al., Appellants.

1. **Administration: LIABILITY OF DELINQUENT ADMINISTRATOR.** Where no final settlement has ever been made, an administrator *de bonis non* may maintain an action against a former administrator, who has failed to comply with an order of distribution, to recover the amount due the distributees.
2. **Instructions.** In the absence of evidence in the record showing that counsel were surprised, this court will not consider declarations of law offered after the announcement of the decision of the trial court.

*Appeal from Nodaway Circuit Court.—Hon. H. S. KELLEY,
Judge.*

AFFIRMED.

Edwards & Ramsay for appellant.

Ira K. Alderman for respondent.

HOUGH, C. J.—On the 13th day of December, 1876, John H. Ware, administrator *de bonis non* of the estate of Mathew Massengale, was removed, and the public administrator was directed to take charge of said estate. Thereupon said public administrator filed a petition in the probate court under section 67, 1 Wagner's Statutes, page 82, praying the court to ascertain the amount of money, the quantity and kind of real estate, personal property and all the rights, credits, deeds, evidences of debt and papers of every kind of said estate in the hands of the said John H. Ware, as such administrator, at the time of the revocation of his letters aforesaid, and to order and adjudge the rendition of the same to the petitioner, and for judgment against said John H. Ware and against Hansen H. Ware and James Burnett, his sureties, for the amount of money found to be in the possession of said John H. Ware at the time of the revocation of his letters of administration, and for all other

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proper orders and decrees in the premises. A copy of the petition was duly served upon John H. Ware and Hansen H. Ware, but not upon Burnett, and as to him no further proceedings were had. John Ware and Hansen Ware filed an answer setting up that said estate had been fully administered, and that John Ware, administrator, had made final settlement thereof on the 13th day of February, 1866, and had been discharged by the probate court. They also pleaded the statute of limitations, but it will be unnecessary to notice this plea. The probate court found that at the time of the revocation of the letters of said Ware, administrator, there remained in his hands of the property of the estate of said Massengale the sum of \$4,704.07, and rendered judgment against him and Hansen Ware, his surety, for said amount. The defendants appealed to the circuit court, where the case was tried anew, and judgment was rendered in favor of the plaintiff for the sum of \$1,692.96, and the defendants have appealed to this court.

It appears from the record that the administrator made three annual settlements, and gave notice, the sufficiency of which is questioned, that he would, at the February term, 1866, make final settlement of said estate, and on the 13th day of February, 1866, he filed a statement of his accounts as administrator, neither signed by himself nor by any one for him, upon which no action appears to have been taken by the court, and no order made discharging him. In 1863 the probate court ordered the defendant to make distribution of the funds in his hands among the heirs of the deceased, without ascertaining who they were, or what were their respective shares. In 1864 a similar order was made. The testimony is conflicting as to whether payment was made by the administrator in pursuance of said order. It is conceded that the debts have all been paid. Five of the eleven children of the intestate died after his decease, leaving as their descendants seventeen children, and to these grand-children of the intestate, the

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administrator admits he never paid anything, because he did not recognize them as heirs.

The principal question in the case is, whether the public administrator can maintain this proceeding, or whether

1. ADMINISTRATION: liability of delinquent administrator. the right of action is solely in the heirs.

The appellants contend that after the orders of distribution shown by the record, were made, the right to sue for the money directed to be distributed, was vested solely in the heirs. Numerous cases cited by counsel for appellants give a right of action to distributees, but the decisions are not uniform as to when such right accrues, nor is it the doctrine of this court that such right is exclusive.

In the case of the *State v. Campbell*, 10 Mo. 24, it was held that an heir or distributee might sue the administrator for a failure to account for money received by him, as soon as the failure occurred, although no order of distribution or final settlement had ever been made. The case of the *State v. Morton*, 18 Mo. 58, is to the same effect. In the case of the *State to use, etc., v. Fulton*, 35 Mo. 305, it was held that when an administrator dies or is removed before final settlement, the administrator *de bonis non* can alone sue for the assets unadministered; and that although the debts be paid, the heirs have no right of action until distribution is ordered. The case of *Vastine v. Dinan*, 42 Mo. 269, decides that the heirs have a right of action when the debts have been paid and distribution ordered. In the *State ex rel. Midgett v. Watson*, 44 Mo. 305, it was held that the heirs can sue, although no order of distribution has been made, if the debts have all been paid and there has been a final settlement. In the *State to use of Kelley v. Thornton*, 56 Mo. 325, it was held that when the debts have been paid, the distributees may sue, although there has been no order of distribution and no final settlement, and that there is no necessity for the appointment of an administrator *de bonis non*. It had been previously held in the *State v. Farmer*, 54 Mo. 439, that an administrator *de bonis*

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non, when appointed, has the right to sue for and collect the assets for the purpose of properly distributing them.

In *Scott v. Crews*, 72 Mo. 261, it was expressly decided that notwithstanding the previous decisions of this court giving a right of action to the distributees when the debts have all been paid, the probate court may in such case appoint an administrator *de bonis non*, and such administrator may institute a proceeding, under section 67, *supra*, against an administrator whose letters have been revoked, or he may maintain an action upon the bond of such removed administrator. Nor does the fact that an order of distribution has been made oust the jurisdiction of the probate court to appoint an administrator *de bonis non*. Until such order has been complied with and the heirs have been paid, the estate is not fully administered. So that, if we concede the orders directing the defendant to pay the money in his hands to the heirs to be sufficient as orders of distribution, the present proceeding may be maintained. The circuit court found in the case before us, that there were assets in the hands of the administrator, Ware, at the time of his removal, which had not been distributed, and there was testimony to support this finding. The evidence shows clearly that no final settlement had ever in fact been made by Ware. The filing of an account cannot, of itself, constitute a settlement. A settlement is the act and judgment of the court, of which there must be some record. *Benson v. Harrison*, 39 Mo. 302.

The instructions presented by counsel to the court after its decision was announced, cannot be reviewed by us. 2. **INSTRUCTIONS.** They were not presented in time. It is fairly inferable from the record that counsel were present in court when the judge announced his opinion and rendered judgment in the cause, and they should have presented their declarations of law before the cause was decided. No surprise of counsel, or refusal of the court to hear them appears in the record.

The judgment is affirmed. The other judges concur.

The State v. Lavelle.

THE STATE V. LAVELLE, *Appellant.*

Costs in Criminal Cases: MINORS. A minor filed a complaint before a justice of the peace, charging defendant with disturbing the peace of the family of another, and the trial resulted in a verdict of acquittal; *Held*, under the provisions of the statutes then in force, (2 Wag. Stat., 854, § 12, amended by Acts 1877, p. 281,) that the costs should have been adjudged against the county, on the ground that the informant was not the injured party; but, *Held* further, that if he had been, a judgment against him would not have been obnoxious to objection on the ground of his minority.

Appeal from Johnson Criminal Court.—Hon. Wm. H. H. Hill, Judge.

REVERSED.

S. P. Sparks for appellant.

D. H. McIntyre, Attorney General, for the State.

PHILIPS, C.—Chas. E. Lavelle, in September, 1879, filed his affidavit in a justice's court, charging one Holt Davis with willfully disturbing the peace of the family of one William Lavelle. On the trial, before a jury, Davis was acquitted, the jury returning the ordinary verdict of not guilty, without more. Thereupon the justice proceeded to tax the costs of the case against the informant. From this action of the justice of the peace, Lavelle appealed to the criminal court of the county. At the trial term therein, appellant filed petition alleging prejudice of the judge against him, supported by the affidavit of the requisite number of witnesses, and asked for a change of venue. This the court refused. On the hearing of the appeal before the judge, the prosecution read in evidence the transcript of the justice's docket. Defendant offered testimony tending to show that he was a minor twenty years and eleven months old, when the costs were assessed against him. Thereupon the court dismissed the appeal. After

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an ineffectual motion for a new trial and in arrest, defendant brings the case by appeal to this court.

The first error complained of by the appellant, is the refusal of the judge of the criminal court to grant him a change of venue. The form of the petition was sufficient, and it was accompanied with the requisite affidavits of witnesses. If the application was otherwise conformable to the statute, it was the plain duty of the judge to have ordered an election for special judge. He had no discretion in the matter. But the record in this case does not show that the application of defendant was sworn to. It is in form an affidavit, but there is no *jurat* attached to it, nor does it otherwise appear that it was sworn to. For aught that appears from the record before us, the judge refused the application because of this defect.

The real question involved in this appeal is, was the justice of the peace authorized, under the facts of the case, in taxing the costs against the party who made the affidavit? The offense charged was a misdemeanor for disturbing the peace of the family, founded on section 26, chapter 205, General Statutes 1865, amended, (see Laws of Missouri 1870, page 46.) The action taken by the justice is sought to be justified under section 5, Laws of Missouri 1874, page 24, which in effect is the same as section 2096, Revised Statutes 1879: "Every person who shall institute any prosecution to recover a fine, penalty or forfeiture, shall be adjudged to pay all costs, if the defendant is acquitted, although he may not be entitled to any part of the same." And in support of this view we are referred to *White v. Walker*, 22 Mo. 433. This involved the case of a proceeding against a vagrant, and clearly indicates that the section of the statute above quoted pertains to a special class of prescribed fines, penalties and forfeitures wholly different from the ordinary offenses against public order or public peace denounced in article 7, Wagner's Statutes, page 490.

In 1877, (Laws 1877, p. 281,) the legislature conferred jurisdiction on justices of the peace, concurrent with cir-

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cuit courts, in all cases of misdemeanors. The offense in question is alleged to have been committed in September, 1879, and the action of the justice complained of occurred on the 9th day of September, 1879. The statute of 1879 is, therefore, not applicable, as appellant's counsel seems to assume it was. But the case rests on the provisions of chapter 83, 2 Wagner's Statutes, as amended by the act of 1877, *supra*. The only provision of this chapter, (2 Wag. Stat., 854, § 12,) touching this matter is section 12: "Where proceedings are commenced under the provisions of this chapter, on the information or complaint of the injured party, his name shall be entered by the justice on his docket as prosecutor, and if the defendant shall be discharged or acquitted, shall be adjudged to pay costs. In other cases of discharge or acquittal the costs shall be paid by the county." It is to be observed that it is only in cases where "the injured party" becomes the informer or complainant that "his name shall be entered by the justice on his docket as prosecutor," and become thereby liable "to pay costs." If the misdemeanor was committed against A by assault, battery or affray, or by disturbing the peace of his family, and he should lodge the information or complaint he would be "the injured party," and in case of discharge or acquittal, would be liable for the costs. The affidavit filed by the appellant, Chas. E. Lavelle, in this case, alleged an offense, not against himself, but against "the family of one William Lavelle." William Lavelle or his family is "the injured party," and not Charles Lavelle. It was, therefore, in my opinion, a case of acquittal where "the costs shall be paid by the county."

In view of the conclusion thus reached, it is not essential to discuss the question raised by appellant's counsel, that the informer being at the time a minor was not amenable to a judgment for costs. But it is not unimportant to add, that, in my opinion, the objection is not tenable. This is not a judgment arising on contract; but it is in the

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nature of a penalty imposed by the criminal code, for ill-advised petty prosecutions, as well as of a means of protection to the community against burdens of taxation unnecessarily created. The statute makes no exception in favor of the improvidence of youth.

The criminal court erred in dismissing the appeal. Its judgment is, therefore, reversed and the cause remanded to be proceeded in conformably to this opinion. All concur.

WERTH, Appellant, v. THE CITY OF SPRINGFIELD.

1. **Municipal Corporation: CHANGE OF STREET GRADE: PLEADING.** It is a well settled rule in pleading that things which are necessarily implied need not be alleged. On this principle, in an action against a city for negligently changing the grade of a street; *Held*, that an allegation that the city "raised the grade" was equivalent to an allegation that the grade was raised in pursuance of an ordinance, since the city could only act in such matters by ordinance.
2. — : DAMAGES CAUSED BY PUBLIC WORKS. For damages arising from negligent and unskillful execution of public works on a proper plan adopted by the proper authority, the party injured may maintain an action in the ordinary form; but what his remedy may be where the fault is in the plan itself, is not decided, though it is certain that under the constitution he is entitled to relief.
3. — : CHANGE OF STREET GRADE: CITY'S LIABILITY THEREFOR. If in changing the grade of a street the city should so negligently perform its work as to practically destroy the street as a highway, it would be liable in damages, while it would not be liable for the simple act of permitting the street to be out of repair, if no special injury ensued therefrom.
4. — : DANGEROUS SIDEWALK. Without showing special damage a property holder has no right of action against a city for tearing up the sidewalk in front of his premises and re-laying it in a manner dangerous to life and limb.

*Appeal from Greene Circuit Court.—HON. W. F. GEIGER,
Judge.*

REVERSED.

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F. M. Sheppard for appellant.

T. J. Delaney for respondent.

HOUGH, C. J.—The petition in this case contains three counts. The first charges that the defendant raised the grade of Walnut street in front of plaintiff's lot, two feet above the level of said lot, in a negligent and unskillful manner, and thereby rendered access to and from said lot and street difficult and dangerous, to plaintiff's damage, etc. The second count charges that in changing the grade of said street in front of plaintiff's lot, a fill was made of materials adapted to receive and retain large quantities of water, which was left unprovided with drainage and exposed to rains and melting snow, so that the same became almost impassable to vehicles, and is in wet weather abandoned as a highway, and cannot be traveled by adjacent property owners with loaded vehicles, without great difficulty, whereby plaintiff's lot has been greatly depreciated in value, to his damage, etc. The third count charges that the defendant tore up the sidewalk in front of plaintiff's lot and replaced the same in a loose, irregular, uneven, negligent and unskillful manner, rendering said walk dangerous to life and limb, to plaintiff's damage, etc. The circuit court sustained a demurrer to the whole petition, on the ground that it stated no cause of action against the defendant, and rendered final judgment thereon for the defendant.

It is contended for the defendant that the petition is defective because it fails to allege in either of the counts that the city of Springfield, "in its legal capacity," authorized the change of grade on Walnut street, and because it does not allege that the injury complained of was the result of a negligent and unskillful execution of the plan adopted by the city council. It is also contended that the defendant cannot be held liable under the second count for a failure to keep its highways in repair, as no direct special damages are alleged to have been sustained by the plaintiff.

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It is further contended that the plaintiff has no special or general interest or ownership in the sidewalk which will warrant a recovery by him for its loss or destruction in whole or in part.

It is undoubtedly true that the defendant can only be held responsible for the acts of its officers, agents or serv-

<sup>1. MUNICIPAL CO R-
PORATION, change
of street grade:
pleading.</sup> ants in changing the grade of a street, when such change has been authorized by ordinance.

But in alleging that the defendant raised the grade to a certain height, it is necessarily implied that it was done in pursuance of some ordinance, as the defendant can only act in such matter by ordinance; and it is a well established rule in pleading, that things which are necessarily implied need not be alleged. Bliss on Code Plead., § 175. Allegations similar to those in the first count were made in *Wegmann v. City of Jefferson*, 61 Mo. 55, and *Foster v. City of St. Louis*, 71 Mo. 157, and no question was made by court or counsel as to their sufficiency. If the allegation in question should be denied, the plaintiff would have to introduce in evidence an ordinance authorizing the change of grade in order to maintain his action against the city. *Thomson v. City of Boonville*, 61 Mo. 282; *Hunt v. City of Boonville*, 65 Mo. 620; *Rowland v. City of Gallatin*, 75 Mo. 134.

The negligence of the defendant is sufficiently averred in the first count. Negligence is not averred of the acts of the city in simply changing the grade, but of the manner in which the change was effected. The allegation is, that the defendant raised the grade two feet in a negligent and unskillful manner.

As the plaintiff does not seek to recover damages resulting simply from the change of grade, it is unnecessary ^{2. —; damage caused by public works.} for us to determine at this time whether such damages are recoverable by action in the ordinary form. Prior to the adoption of section 21 of article 2 of the constitution of 1875, a city could not be held liable for damages necessarily attendant upon the proper

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and skillful execution of the plan adopted by the city council, but was liable for such damages as resulted alone from the negligent and unskillful execution of the work done in pursuance of the plan adopted. *Foster v. City of St. Louis*, 71 Mo. 157, and cases cited. That rule has been changed by the section of the constitution above cited. That section is as follows: "That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three free-holders, in such manner as may be prescribed by law and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. * * *

When property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of the constitution. No such provision, however, as is contemplated by the constitution, has ever been made by the legislature for ascertaining the compensation in cases where property is damaged by a change of grade. The compensation provided for by this section of the constitution, is compensation alone for the lawful execution of the public work causing the damage, and not for the negligent and unskillful construction thereof. For damages arising from the negligent and unskillful execution of the work, an ordinary action undoubtedly still remains to the party injured. Compensation for such damages could not be ascertained in advance of the execution of the work. We are of the opinion that the first count states a cause of action.

The second count is also based upon the negligent construction of the street, and presents in detail some of the 3. ——: change of matters which might be proved under the street grade: city's liability therefor. first count. Its allegations are barely sufficient to support a judgment. Facts may be shown under it which may perhaps render the city liable. If in chang-

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ing the grade of a street the city should so negligently perform its work as to practically destroy the street as a highway, we think it would be liable in damages, while it would not be liable for the simple act of permitting it to be out of repair, no special injury having ensued therefrom.

The third count states no cause of action. No special damages are alleged, and the plaintiff has no right of action ~~4. ——~~: dangerous simply because the sidewalk has been left sidewalk. in a condition dangerous to life and limb.

The judgment of the circuit court will be reversed and the cause remanded. All concur.

KELsay v. FRAZIER *et al.*, *Appellants.*

1. **Homestead:** ADMINISTRATOR'S SALE OF, WHEN VALID. To make a sale of the homestead by an administrator valid, it must appear that the debt for the payment of which it was sold, was contracted before the homestead right attached or was acquired; and the burden of showing this rests on him who claims under the administrator's deed.
2. —— : AN AGREEMENT CONSTRUED. The widow and heirs of a decedent agreed together as follows: "We hereby obligate ourselves to divide the estate of the deceased, after the payment of all debts and expenses of administration, into three equal parts and each take one-third, in full of all claims and demands against said estate; it being hereby intended by the widow of said deceased, to relinquish all claim of dower, in consideration of the above provision; and, we further agree, if said division cannot be made, in kind, that the property shall be sold by the public administrator of Morgan county, and, after the expenses are paid, the proceeds of such sale divided among us according to our respective interests, as above stated." Held, that this was simply an agreement as to how the estate should be divided after the payment of debts, and did not authorize the probate court to have the homestead right of the widow sold for the payment of debts.

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*Appeal from Morgan Circuit Court.—Hon. E. L. EDWARDS,
Judge.*

REVERSED.

Draffen & Williams for appellant.

A. W. Anthony for respondent.

NORTON, J.—This is an action of ejectment to recover possession of lots 104 and 105 in block 49 in the town of Versailles, Morgan county. The petition is in the usual form. The answer is a general denial and also sets up title in defendants Rice and Wells. On the trial of the cause plaintiff obtained judgment, from which the defendants have appealed. Both parties claimed title through John C. McCoy, who died in September, 1873. Plaintiff in support of his title offered in evidence a deed from John Simms, public administrator of Morgan county, having in charge the estate of said McCoy, deceased, conveying the lots in controversy, the sale having been made by him in pursuance of an order of the probate court of said county, directing the sale of said property for the purpose of paying the debts of said McCoy, deceased. This deed was dated January 29th, 1876. The defendants, in support of their claim of title, put in evidence a deed from Evaline McCoy, the widow of said John McCoy, deceased, dated January 18th, 1876, conveying to defendant Rice an undivided half interest in the lots sued for; they also offered evidence showing that said John McCoy was living on the said lots at the time of his death, with his family, as his homestead; that the property was not worth exceeding five or six hundred dollars; that said McCoy died in 1873 leaving said Evaline, his widow, surviving, who for a short time continued to reside on the premises, and four years later died, leaving defendant Porter Wells her only surviving heir. Defendants here rested.

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and plaintiff offered, and the court received in evidence, over defendants' objection, the following paper:

"We, the undersigned, widow and heirs of John C. McCoy, deceased, have this day agreed with each other, and hereby obligate ourselves to divide the estate of the deceased, after the payment of all debts and expenses of administration, into three equal parts, and each take one-third in full of all claims and demands against said estate; it being hereby intended by the widow of said deceased, to relinquish all claim of dower, in consideration of the above provision; and, we further agree, if said division cannot be made, in kind, that the property shall be sold by the public administrator of Morgan county, and, after the expenses are paid, the proceeds of such sale divided among us according to our respective interests, as above stated. Witness our hands and seals, this 29th day of September, 1873.

EVALINE U. MCCOY, [SEAL.]

WILLARD J. MCCOY, [SEAL.]

LUCINUS S. MCCOY, [SEAL.]

The court gave on plaintiff's motion, and against the objection of defendants, the following instruction, viz: "If the jury believe from the evidence that Willard J. McCoy and Lucinus McCoy and Evaline U. McCoy, the widow, were the only heirs at law of John C. McCoy, at the time of his death, and that they executed and acknowledged the instrument of writing, read in evidence, and that in pursuance of said agreement, the probate court of Morgan county ordered a sale of the property in controversy, and that the same was sold by John Simms, administrator of the estate of John C. McCoy; that plaintiff purchased the same and received the deed therefor, read in evidence, then they will return a verdict for the plaintiff, for the possession of said premises."

Several instructions were asked by defendants and refused, the only one of which deemed material to be considered in the disposition of the case, is as follows: "The

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administrator's deed, read in evidence, only passed such title as John C. McCoy had in said property, at the time of his death, subject to the homestead of his widow, Evaline U. McCoy, and if the jury shall find that John C. McCoy died in the year 1873, and that his widow, Evaline U. McCoy, survived him, and that at the time of his death they were residing upon and using the property sued for, as a homestead, then the title to said homestead, not exceeding eighteen square rods of ground, nor more than \$1,500 in value, passed to and vested in Evaline U. McCoy, and the administrator's sale and deed passed no title to said homestead to the plaintiff, and he cannot recover the possession of said homestead, and the jury ought to so find."

When a husband died, anterior to the amendment made to the homestead law in 1875, the owner of a homestead, it has been repeatedly held that such right upon his death vested in his widow, and was not subject to the payment of his debts. *Gragg v. Gragg*, 65 Mo. 343; *Skouten v. Wood*, 57 Mo. 380; *Freund v. McCall*, 73 Mo. 343. In the case of *Rogers v. Marsh*, 73 Mo. 64, while the doctrine of the above cases was re-affirmed, and while it was held that a homestead might be sold for the payment of debts contracted anterior to the acquisition of the homestead, it was further held that to make a sale by an administrator of the homestead valid it must appear that the debts for the payment of which it was sold were contracted before the homestead right attached or was acquired, and that the burden of showing this rested on him who claimed under the administrator's deed. Inasmuch as on the trial of this cause there was no evidence tending to show that the debts of McCoy, deceased, for the payment of which the lots in question were sold, were contracted prior to the acquisition of the homestead, under the rulings of this court in the above cases the above instruction asked by the defendants ought to have been given, and the court erred in refusing it.

We are of the opinion the court also erred in receiving

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in evidence the writing signed by Mrs. McCoy, Willard and 2. — : ~~an agree-~~ Lucinus McCoy, for the reason that it does ~~ment construed.~~ not purport to relinquish any homestead right of Mrs. McCoy, but only her dower, and is simply an agreement between the parties thereto as to how the estate shall be divided between them, after the payment of debts, under which plaintiff can claim no right, and under which the probate court could derive no authority to sell the homestead right of Mrs. McCoy. If the question of dower had only been involved in the controversy, it might then have been received in evidence for the purpose of establishing an estoppel as against Mrs. McCoy and those claiming under her.

Judgment reversed and cause remanded, in which all concur.

ELLISON v. WEATHERS, *Appellant.*

1. **Arbitration.** If an award is broader than the submission, and either constitutes one entirety or its several parts are so connected as to be conditional and dependent upon one another, it will be void; but if one part is complete in itself, and is separable from and independent of the rest, and that part is covered by the submission, it will be upheld, while the rest will be rejected; but even the part not within the submission will become binding if accepted by the parties.
2. — : **RATIFICATION.** No new consideration is necessary to uphold a subsequent ratification of an unauthorized award.
3. — : **WITNESS.** An arbitrator is not a competent witness to impeach his own award.

*Appeal from Jasper Circuit Court.—HON. JOSEPH CRAVENS,
Judge.*

AFFIRMED.

J. Morris Young and Phelps & Brown for appellant.

A. L. Thomas for respondent.

RAY, J.—This case originated before a justice of the peace in Jasper county, where the plaintiff had judgment, from which the defendant appealed to the circuit court, where plaintiff again had judgment, from which the defendant appealed to this court. The statement filed before the justice was to the effect following:

"Plaintiff states that on the — day of November, 1878, he was the owner of one white heifer, of the value of \$25, which defendant wrongfully took from plaintiff and converted to his own use, to the damage of plaintiff in the sum of \$40. Plaintiff further says that on the — day of November, 1878, he and defendant, by agreement, selected three arbitrators, (Buchanan, Potts and Ellis,) to hear and determine said controversy; that they submitted the same to said arbitrators, each party agreeing to abide the decision, and perform whatever should be adjudged and determined by said arbitrators; that said arbitrators, after hearing the evidence produced by the respective parties, made and published their award, in the presence and hearing of the parties, to the effect following: 'That if the defendant retained the heifer, he should pay the plaintiff the sum of \$15 for said heifer, and all the witness fees and mileage, and pay plaintiff for his own fees as a witness.' Plaintiff says that the defendant thereupon agreed to pay plaintiff said sum of \$15, and the further sum of \$15 witness fees, there being seven witnesses taken by plaintiff, who traveled seventeen miles to place of trial; and that the defendant refuses to pay the same to plaintiff, although the same is due and unpaid. Thereupon he asks judgment against the defendant for the sum of \$30, with interest and costs."

Neither party requiring a jury, the case was submitted to the court for trial. The record shows that the agreement to arbitrate, the submission to arbitrators, as well as

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the award of the arbitrators, were altogether oral; that Buchanan, Potts and Ellis were all chosen as the arbitrators; that the question submitted to them for decision was the "ownership" of the heifer; that all three of the arbitrators met to hear, consider and determine the question thus submitted; that the plaintiff and defendant, with their witnesses, appeared before said arbitrators and testified about the matter; that it appeared from said testimony that prior to the date of the arbitration the plaintiff had been in the possession of said heifer, but that the defendant had driven her off, and at the time of the arbitration had her in his possession in a lot close by where the arbitration was being held—both parties claiming to be the owner; that, after hearing all the testimony produced by the respective parties, the arbitrators all retired to consider and determine the question, (and also proceeded to said lot to look at the heifer in controversy,) and thereupon made and published their award, in the presence and hearing of the parties, to the effect "that the heifer belonged to the plaintiff;" and further, "that if the defendant elected to retain the heifer, he was to pay the plaintiff \$15, as the value of the heifer, and to further pay all the costs of the arbitration, witness fees, etc.; if the defendant returned the heifer to the plaintiff, then he was to pay half the costs and the plaintiff the other half."

What followed this announcement of the award, the record shows was differently stated by the parties and witnesses, and in some particulars was the subject of conflicting and contradictory testimony. On some of the points, however, all the witnesses as well as the parties agree. The plaintiff and witness Buchanan both testify that upon the announcement of the award, the defendant said he would retain the heifer, pay the \$15, as the value of the heifer, and the costs. The defendant and witness Chase each deny that defendant said any such thing. Other witnesses testify that they did not hear the defendant say he would pay the award. All the witnesses, however, including both

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plaintiff and defendant, agree in testifying that upon the announcement of the award, the defendant said (presumably addressing the witnesses) "Boys, what's your bills;" or, (as one witness expressed it,) "Boys come up here till I see what you are going to charge me." All the witnesses and parties further agree that the defendant thereupon also, asked Esq. Ellis what his fees were, and paid him \$2, the amount of his charges. The record further shows that the defendant retained the heifer and made no offer to return her to the plaintiff; that the plaintiff was present during all this time, and expressed no dissent and made no objections to what the defendant said and did; nor did he set up any claim or make any demand for the heifer.

Buchanan testified that he, Potts and Ellis were the three arbitrators, who heard and tried the case as such; that after hearing the testimony, they all adjourned to the lot and looked at the heifer in controversy; that they all agreed that the plaintiff was the owner of the heifer; that Ellis then said we should fix the value of the heifer; I said she was worth \$18. Potts thought \$13 was enough, when Ellis decided the value to be \$15. Ellis also said we must settle about the costs, which we did. We all then returned to the school house where the arbitration was held, and Ellis announced the award as hereinbefore stated.

Ellis testified that he was present at the arbitration, that he acted as umpire only, and not as one of the arbitrators; that he did not understand or consider himself as one of the arbitrators, but solely as umpire, and only called on to act in case the two arbitrators did not agree; that he swore the witnesses and the two arbitrators, Buchanan and Potts, but that he was not sworn; that the award was as stated; that he had nothing to do in making said award, except to decide the value of the heifer, when the two arbitrators differed as to the value; that he did not concur in or approve the award, but at the request of the two arbitrators he announced the award, but made no announcement of his dissent or objection to the same.

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Buchanan on being re-called, said he never heard that Ellis did not consider himself as one of the arbitrators. He appeared to be acting as one, and I considered him as one. He never objected to the decision as to who was the owner of the heifer.

At the close of the testimony the court gave the following instructions for the plaintiff, over the objections of the defendant, who excepted:

1. If the court find from the evidence that the plaintiff and defendant authorized Walter Buchanan, H. C. Potts and S. J. Ellis to settle and determine a certain dispute arising between them in relation to a certain heifer, agreeing to abide and perform whatever should be determined by said Buchanan, Potts and Ellis, and that after hearing the statements and evidence of the parties, they decided that if the defendant retained the heifer, he should pay the plaintiff \$15 and all costs, and that afterward defendant elected to retain the heifer and agreed to pay said sum and costs, then the finding shall be for the plaintiff.

2. If the court find from the evidence that the plaintiff and defendant submitted a controversy, in regard to a certain heifer, to Walter Buchanan and H. C. Potts, as arbitrators, and Esquire Ellis, as umpire, to decide if the arbitrators could not agree; mutually agreed to abide by and perform such award as the arbitrators should make, or such as the said Ellis should make if said arbitrators could not agree, and that the said arbitrators, after hearing the evidence, awarded and published that if the defendant retained the heifer he was to pay plaintiff \$15 and all costs incurred before such arbitrators, and if the court finds that defendant then elected to retain said heifer and pay said costs, and did then pay a part of said costs, then the finding should be for the plaintiff.

The court also refused the following instructions asked by the defendant, to which he excepted:

1. The court sitting as a jury declares the law to be

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that under the pleadings and evidence in this case, the plaintiff is not entitled to recover.

2. If the court, sitting as a jury, believe from the evidence that the plaintiff and defendant mutually agreed to and did arbitrate and submit the question, as to whether the plaintiff or defendant was the owner of a certain white heifer, mentioned in plaintiff's statement, to Buchanan, H. C. Potts and Esquire Ellis, a justice of the peace of Cherokee county, Kansas, as arbitrators, and that said arbitrators awarded that plaintiff was the owner of said heifer, and assessed the value of said heifer at \$15, and further awarded that if defendant retained said heifer, he should pay the plaintiff the sum of \$15 and all the costs and expenses of said arbitration; or if the plaintiff retained the heifer, then the plaintiff was to pay one-half the costs and expenses of said arbitration, then the plaintiff cannot recover in this action.

3. That if the arbitrators took into consideration and made an award about matter not involved in the submission to them, then the award is unauthorized and void as to such matter; therefore, if the court, sitting as a jury, believe from the evidence that the said arbitrators awarded and determined, that in the event that defendant retained the heifer in controversy, he should pay the plaintiff the sum of \$15, and all the costs and expenses of said arbitration, or if the plaintiff retained the heifer, then the plaintiff was to pay one-half the costs and expenses of said arbitration, then said award is void, and the court should find for the defendant.

4. If the court find from the evidence that all the arbitrators did not join or concur in the award sued on, the plaintiff cannot recover in this action.

5. If the court believe from the evidence that Esquire Ellis did not consider himself as one of the arbitrators, but merely as an umpire, believing and thinking that he had no voice or vote in the matter, as to what award should be made, unless the other arbitrators, Buchanan and Potts,

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failed to agree, and that said Ellis, acting upon the idea that he sustained no other relation to the arbitration than that of an umpire, or third person called in to preside over the deliberations and to act only in the event that the other arbitrators failed to agree, and that said Buchanan and Potts did agree upon the award and reported the same to said Ellis, who thereupon announced the award declared upon in this case, thinking that he was announcing the award and determination of the said Buchanan and Potts only, and not joining or concurring, or intending to join or concur in such award, then the finding will be for the defendant.

Whereupon the court found the issues for the plaintiff, and also found that the defendant was indebted to the plaintiff in the sum of \$28.20, and gave judgment accordingly. The usual motions for new trial and in arrest of judgment were made and overruled, to which the defendant excepted and brings the case here by appeal.

The only questions before us grow out of the action of the trial court in giving and refusing instructions and in overruling motions for new trial and in arrest. The instructions and the motions raise the same questions, and may, therefore, be considered together. It is contended for defendant that the award in this cause is inadmissible and void: 1st, Because it decides upon more than was submitted, and this action is to enforce the entire award, as made, to-wit; ownership, value of heifer and the costs. 2nd, Because the submission was to three arbitrators, with no provision for a less number to act, while the record shows that the award was made by two only, and that the third did not concur in or approve the same. 3rd, that there was no act of defendant upon the announcement of the award, or subsequent, that estopped him from controverting the validity or force of the award, or that renders him liable to the plaintiff for the amount sued for, or any part thereof. These, we believe, are the principal points relied on by the defendant for a reversal in this cause.

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In the first place, let us see to what extent, if at all, these objections are true, when tested by the facts in this record. Secondly, If true, what force or validity do they possess, or what application do they have to the facts of this case or the cause of action in this record. And lastly, Let us ascertain, if we can, what is the cause of action really sought to be enforced by this suit, and actually passed upon and decided by the court in its finding and judgment herein.

It will be remembered, in the first place, that the arbitration in question is at common law, and not under the I. ARBITRATION. statute. In the next place it may be conceded, for such is the law, that if the award is broader than the submission, and constitutes one entirety ; or if the several parts are so connected, as to be conditional and dependent upon one another, then the award is not valid and will not support an action. Morse on Arbitration, 178, 181. It is equally true that an award may be valid in part and void or invalid as to the remainder. Morse on Arbitration, 453. If the award consists of several parts, one of which is complete in itself and wholly separable from and independent of the others, and that part is covered by the submission, it is valid and may be sustained while the portions outside the submission will be rejected. Morse on Arbitration, 453. The award in this record, as appears by inspection, has two parts, the first of which is complete in itself and wholly separable and distinct from the latter. This part also, as shown by the record, was distinctly submitted, and specifically decided by the award, and tested by the above rule is valid and conclusively binding, whilst the latter part is confessedly outside the submission, and as an award (if such it can be called) of itself, has no force or validity whatever. On its face, however, it does not purport to decide anything, and is in no just sense an award. At most, it is in the nature of a proposition from the arbitrators to the plaintiff and defendant, which they were at perfect liberty to reject or accept. If, however, they see proper to accept it and in

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fact do accept it, why are they not bound thereby? Whether they did accept it or not (being the question at issue) depends upon what they did and said, in reference to the same, and that was a matter in evidence, to be judged of and passed upon by the court that tried the cause. If they did accept the proposition, the legal effect of that acceptance was to pass the title to the heifer from the plaintiff to the defendant, and render the latter liable to the former for the value of the heifer and the cost of the arbitration as the same had been ascertained by the arbitrators, and that also was a matter of evidence, submitted to and passed upon by the court. If also, as we think the evidence abundantly shows, the defendant thereupon elected to retain the heifer, which he already had, and agreed to pay its value and the cost, as aforesaid, and if the plaintiff consented and acceded to the same, nothing else whatever remained for the plaintiff to do in order to render the contract complete and binding.

Benjamin on Sales, §§ 308, 311, 315.

Again, we think the further objection of the defendant that this action was to enforce the entire award as made: 2. — : ratification, ownership, value of the heifer and the cost, manifestly is not well taken. The statement filed before the justice consists of three divisions. The first has reference to the wrongful taking and conversion of the heifer; the second, to the arbitration that followed, and the third to what transpired between plaintiff and defendant in reference thereto, upon the announcement of the award, and, as we have already seen, this last branch of the statement manifestly constitutes the cause of action sought to be enforced by this suit. The alleged conversion was but the inducement to the arbitration that followed, and that, in turn, became the inducement to what transpired between the parties upon the announcement of the award. The award, therefore, it is apparent, is the inducement to and not the subject of the action. The real purpose of the suit, as we have already seen, was to enforce the legal effect of what took place between the parties upon the announce-

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ment of the award, and that as we have also seen, amounted, in legal contemplation, to a "bargain and sale," by which the ownership of the heifer (conclusively settled by the award, to have been with the plaintiff,) was transferred from plaintiff to defendant, and a corresponding liability imposed on him to pay for it, as ascertained by the award. In addition to this it may be stated, for such is the law, that there is respectable authority for the position, that conceding the latter clause of the award was in its nature really a part thereof, and conceding further, that it possessed no validity for want of prior authority, if not absolutely void, that defect may be waived by a subsequent ratification. The doctrine on which this position rests, is that arbitrators are but the chosen agents of the parties, and like any other agents, if they exceed their authority, in any particular, to that extent their action is wanting in validity, yet, as in other matters of agency, the defect may be waived, and is cured by subsequent ratification, and that, in such cases, no new consideration is necessary to uphold the ratification. Morse on Arbitration, 106, 170, 171, 174, 175; *Ferris v. Thaw*, 72 Mo. 446; *National Bank v. Gay*, 63 Mo. 39; Abbott's Trial Ev., 465, 467; 6 Waite's Actions and Defences, 587; *Bullitt v. Musgrave*, 3 Gill (Md.) 32; *Hamlin v. Duke*, 28 Mo. 166; *Squires v. Anderson*, 54 Mo. 193.

As to the further point, that the award in question was made by one only of the arbitrators, and that the third did a. — : witness. not concur in or approve the same, the record fails to sustain the objection. Both plaintiff and defendant agree that all three were chosen as arbitrators; that they all met as such, and after hearing the testimony retired for consultation and determination, and upon their return, announced their award. In this the parties are supported by all the other witnesses, including one of the arbitrators, except the witness Ellis, who testified that he was one of the parties selected, but he understood and considered that he was an umpire only, and not an arbitrator, and that he acted only in that capacity, that he did not approve

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or concur in the award, but made no announcement of his consent or non-concurrence at or before the making or publishing of the award, and that he made the announcement of said award at the request of the other two. This private understanding of Ellis as to the capacity in which he was acting unannounced, or otherwise made known to his fellows, the parties or the public, at or before the announcement of the award, is not permissible in law, to impeach or invalidate the award; neither was he a competent witness, in a suit upon the award, thus to nullify his official action as such. Indeed the law is well settled that the dissent of an arbitrator from the award of his fellows must be expressed at or before the time of publication. If he unites with them in making the award, or is present at the publication and announces the award to be the decision of the arbitrators, he will not be heard afterward to impeach the award by testifying that in fact he did not concur or unite with them in making and publishing the same. For such a purpose he is an incompetent witness. Like a juror, he cannot be called to impeach his award, but like him he may be called to sustain it. Morse on Arbitration, 162, 164; *Stone v. Atwood*, 28 Ill. 30, 42, 43; Abbott's Trial Ev., 468, 469, 470; Waite's Actions and Defences, 554; 5 Cow. 383, 384, 387, 388; 4 Cush. 317, 321; 20 Barb. 482; 10 Met. 431, 433. If it were otherwise it would be in the power of any one of the arbitrators, in any award, by testifying as Ellis did in this case, to overthrow the same. Such, manifestly, is not the law. Public policy forbids it.

The only remaining objection of the defendant, that there was no act of his, upon the announcement of the award, or subsequently, by which he was estopped from denying its validity or asserting his right, is not sustained by the record, and has already been considered and disposed of adversely to his claim.

As to the instructions, it may be sufficient to say: 1st, That while the phraseology of the plaintiff's instructions

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may be subject to verbal criticism, yet they submitted fairly the whole question arising on all the evidence before the court. There was, therefore, no error in this particular.

Instructions numbered two and three for defendant, are objectionable in that they ignore altogether all that part of the testimony tending to show that the defendant, after the award was made and announced, elected to retain the heifer and pay value and the cost of arbitration, as ascertained and proposed by the arbitrators. The court may have believed all that these instructions assumed, and yet under all the facts in evidence, the plaintiff might still be entitled to recover. *Porter v. Harrison*, 52 Mo. 521; *Royston v. Trumbo*, 52 Mo. 35; *Ellis v. McPike*, 50 Mo. 574; 50 Mo. 516; 56 Mo. 289; 56 Mo. 296.

As to the fourth and fifth instructions of defendant, it may be sufficient to say, as we have already seen, that there was no competent evidence before the court on which to base them, and in that view it was not error to refuse them.

As no error appears in the record materially affecting the defendant's interests to his prejudice, the judgment of the court is affirmed. All concur, except HENRY, J., who dissents.

**GARESCHE, Administrator of the Sectional Dock Co., v. PRIEST,
Executor of Taylor, Appellant.**

Administrator: INVESTING FUNDS OF THE ESTATE. When an administrator, without first being authorized by an order of the probate court so to do, lends out or invests the funds of the estate in his hands, he does so at his peril.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Garesche v. Priest.

Alex. J. P. Garesche for appellant.

D. T. Jewett for respondent.

NORTON, J.—There are no pleadings, the case having originated in the probate court of the city of St. Louis. The St. Louis Sectional Dock Company is a partnership and not a corporation. Upon the death of Patrick Rogers, a partner, the surviving partners refusing to take charge of the co-partnership, Capt. Dan. G. Taylor qualified for the individual and partnership estates. Later, conscious that his own death was imminent, he obtained leave to resign both administrations and in respect to both was succeeded by Ferd. L. Garesche. John G. Priest qualified as Taylor's executor, and for him made the final settlement of the affairs of the dock company. Exceptions were taken to three investments with which Taylor was credited :

Purchase of note of Rogers	\$ 4,000
Purchase of note of Mrs. Deaver	6,500
Purchase of bonds on St. John's Episcopal Church	10,000
<hr/>	
	\$20,500

All of which bore interest at the rate of ten per cent per annum, and were secured by deeds of trust on realty in the city and the county of St. Louis. The probate court overruled these exceptions. And the administrator of the dock company appealed to the circuit court. Before trial was reached, the loans to Rogers and Mrs. Deaver were repaid in full, so that the only dispute is as to the church bonds. The St. Louis circuit court rendered judgment against the estate :

Bonds	\$10,000 00
Interest at six per cent :	1,728 33
<hr/>	
	\$11,728 33

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Less interest on bonds credited in settlement	\$1,301 40
\$10,421 93	

The defendant appealed from this judgment of the circuit court to the St. Louis court of appeals, where the judgment was affirmed, and from this judgment defendant has appealed to this court. The case is reported in 9 Mo. App. 270, the court holding that when an administrator invests funds in his hands in bonds secured by deed of trust upon a church building without an order of court authorizing it, he will be held to answer for any loss arising from said investment with interest on the funds so invested, although such investment may have been made in good faith. Or in other words, when an administrator without first being authorized by an order of the probate court so to do, lends out or invests the funds of the estate in his hands, he does so at his own risk. After an examination of the opinion in which the questions presented by the record are discussed at some length, we think that the action of the court in affirming the judgment was rightful, and without repeating the grounds upon which its judgment was based, hereby affirm it. All concur.

DEARDORF'S Administrator, v. THACHER et al., Appellants.

1. **Non-trading Partnerships: POWER OF MEMBERS TO EXECUTE NOTES.** Ordinarily, partners in a non-trading firm have no implied power to bind each other by commercial paper executed in the name of the firm. To make such paper binding, it must be shown either that the making of it was consented to in advance or subsequently ratified by the other partners, or else that from the constitution and particular purposes of the firm the power is necessary or usually exercised.

This rule applied to a firm engaged in the insurance, real estate and collecting business.

Hickman v. Kunkle, 27 Mo. 401, overruled.

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PER HENRY, J. One member of a co-partnership, not a trading or mercantile co-partnership, may bind the firm by a note executed in the name of the firm for articles or labor necessary in the business of the firm. *Prima facie* such a note is not binding on the firm. In order to enforce it against them the holder must show that the consideration was articles or labor necessary in the business of the firm or that it was executed with the consent of the other members.

2. — : LIABILITY OF FIRM FOR NOTES MADE BY A MEMBER. A note given in the name of a firm but not for a debt or by authority of the firm, will never be enforced against the firm at the instance of a person receiving it under circumstances calculated to provoke inquiry as to the authority of the partner executing it to bind his co-partners.
3. **Per Hough, C. J.** The note sued on in this case is not binding upon the other members of the firm (a non-trading firm) because executed in direct violation of the articles of co-partnership.

Appeal from Jackson Circuit Court.—Hon. S. H. Woodson, Judge.

REVERSED.

Karnes & Ess for appellants, in addition to the authorities referred to in the opinion of the court, cited *Tompkins v. Woodyard*, 5 W. Va. 216; *New York Ins. Co. v. Bennett*, 5 Conn. 574; *Cocke v. Branch Bank*, 3 Ala. 178; *Heffron v. Hanaford*, 40 Wis. 305; *McCrary v. Slaughter*, 58 Ala. 230; *Wittram v. Van Wormer*, 44 . 525; *Breckinridge v. Shrieve*, 4 Dana (Ky.) 375; *Lindley on Partnership*, (Ewell's Ed.) p. *260, 267, 268.

Wm. E. Sheffield for respondent, cited *Hickman v. Kunkle*, 27 Mo. 401; *Doty v. Bates*, 11 John. 344; *Onondaga Co. Bank v. DePuy*, 17 Wend. 47; *Whitaker v. Brown*, 16 Wend. 505; *Bascom v. Young*, 7 Mo. 1; *Braches v. Anderson*, 14 Mo. 441; *Church v. Sparrow*, 5 Wend. 223.

SHERWOOD, J.—Action on a promissory note, executed by Webster, as member of the firm, in the firm name of Thacher, Webster & Ellison. Thacher and Ellison denied

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the execution of the note under oath. The firm was engaged in the insurance, real estate and collecting business in Kansas City. The cause was referred to a referee, who made a special finding of facts, as follows:

1st, All the lumber charged in the several bills making up the amount for which the note sued on was executed, was purchased directly by defendant, Webster, or indirectly by him through E. O. Gibbs and F. M. Cottrel, by his direction, except one small item charged in one of the bills as having been obtained by one McBride for defendant Thacher. 2nd, Part of said lumber was used in building the house of said Gibbs, and certain houses of said defendant Webster, in which the said defendants Thacher and Ellison had not in fact any interest. 3rd, Other of said lumber was used in constructing a school house in Wyandotte county, Kansas, for the erection of which said house said Cottrel was the contractor, in which neither of said defendants had any interest, either as a firm or as individuals, and the lumber therefor was all bought by said Cottrel. 4th, Other of said lumber was purchased for use in making repairs upon houses, for the renting and care of which the defendants, as a firm, were agents. 5th, Said defendant Webster so bought and procured all of said lumber on the credit of said firm of Thacher, Webster & Ellison, without the knowledge of the said Thacher and Ellison, and said Deardorf sold and delivered all said lumber on the credit of said firm without any knowledge on his part that the same was not being bought for and applied to the purposes of said firm. 6th, By the articles of co-partnership between said defendants Thacher, Webster & Ellison, as between members of said firm, said Webster had no authority to make and deliver to plaintiff the promissory note sued on in the name of said firm, but the said plaintiff, Deardorf, had not any knowledge of that fact. When he took said note he took the same in good faith pursuant to the credit extended.

I.

Partners engaged "in trade," have an authority implied by law to bind each other by commercial paper executed in the firm name. Partners in other business, such as farming, mining, etc., have *prima facie* no such authority. But this presumption against lack of authority may be rebutted by showing that the organization and particular purposes of the firm are such as to render it in the special instance necessary, or if not necessary, usual in similar cases. Smith's Merc. Law, 82, and cases cited. The ability of one partner to so charge the firm of which he is a member, as to render it liable in an action of assumpsit, is not now under discussion, the sole point here being whether a member of a non-mercantile firm, can, *prima facie*, even for the purposes of the firm, bind the firm by a note executed in its name.

In the case of *Hedley v. Bainbridge*, 3 Ad. & El. (N. S.) 315, (43 E. C. L. 752,) where a note was given in the name of a law firm, by one partner, Lord Denman, C. J., said: "No doubt a debt was due from the firm; but it does not follow that one partner had authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange; for it is in the usual course of mercantile transactions so to do, and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments; nor is it necessary for the purposes of their business." The plaintiff in that case was non-suited. This is the uniform rule of decision in England, as shown by numerous cases, the latest being that of *Garland v. Jacomb*, Law Rep., 8 Exch. 216; s. c., 6 Moak 289, decided in 1873. There a bill of exchange was drawn by one of two attorneys in partnership, in the name of the firm, and indorsed for his individual purposes by the same partner, in the firm name, to the plaintiff, the other partner having no knowledge of

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the transaction, and was accepted by an accommodation acceptor, and it was held that such indorsement was invalid, and the acceptor not estopped to deny its validity, thus following the doctrine of *Dickinson v. Valpy*, 10 B. & C. 139, and *Hedley v. Bainbridge*, 3 Ad. & El., cited by Mr. Smith, *supra*.

This point of the ability of one partner of a non-trading firm to bind the firm by a note issued in the firm name, has been very carefully and elaborately discussed, and many cases considered by the supreme court of Wisconsin, in 1875, where the matter is summarized thus: "We gather from all the authorities that the distinction between a trading and a non-trading partnership, in respect to the power of a partner to bind his co-partner by negotiable instruments, is not limited to a mere presumption of such authority in one case, and the absence of such presumption in the other, as the learned counsel for the plaintiff argued; but we think, and must so hold, that one partner in a non-trading partnership cannot bind his co-partner by a bill or note drawn, accepted or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor, from his co-partner, or unless the giving of such instruments is necessary to the carrying on of the firm business, or is usual in similar partnerships, and that the burden is upon the holder of the note who sues upon it, to prove such authority, necessity or usage," *Smith v. Sloan*, 37 Wis. 285; s. c., 19 Am. Rep. 757.

This view is abundantly sustained by the text writers, (Story on Part., § 102 a; Story on Agency, § 124; 1 Collier on Part., § 124; Byles on Bills, 43; Chitty on Bills, 39;) and, also, by a number of American authorities. *Ulery v. Ginrich*, 57 Ill. 538; *Hunt v. Chapin*, 6 Lans. 139; *Cocke v. Bank*, 3 Ala. 175; *Prince v. Crawford*, 50 Miss. 344; *Waller v. Keyes*, 6 Vt. 257; *Graves v. Kellenberger*, 51 Ind. 66; *Benton v. Roberts*, 4 La. An. 216.

The case of *Hickman v. Kunkle*, 27 Mo. 401, cited as showing that *prima facie* the note of any firm makes the

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partnership liable thereon, is not sustained by the authorities. The rule is just the other way as already seen. The case of *Doty v. Bates*, 11 Johns. 544, sustains *Hickman's case*, but cites some cases from New York, which do not support it, as they were all cases where the firms were mercantile firms, and of course, governed by the rules already stated in relation to such firms. The same may be said of the cases cited by counsel for plaintiff: 5, 16 and 17 Wendell. The loose remarks sometimes made by courts in this class of cases arise, doubtless, from failing to advert to the broad distinction between trading and non-trading partnerships.

The opinion is, therefore, entertained, that *prima facie* the firm of Thacher, Webster & Ellison is not liable on the note in suit, and that the burden of overcoming the *prima facie* case against him, is thrown upon the plaintiff. Has he successfully met the issue which the law thus tenders him? This question, I am satisfied, must receive a negative answer. There is nothing in the report of the referee, or looking behind it, in the evidence in this case, to rebut the presumption which meets the plaintiff at the outset, that Webster had no authority to bind the firm. The finding of the referee is express, that by the articles of co-partnership, no authority existed to execute notes in the firm name, and that Thacher and Ellison had no knowledge of Webster's transactions in this regard. And the referee finds no consent or ratification on their part. Nor does he find that Webster's act of giving the note was from the constitution and particular purposes of the firm, either usual or necessary. According, then, to the authorities cited, there can be no recovery on the note even were it conceded that Webster could charge the firm with the debt created by obtaining the lumber.

II.

But there is another view which may be taken of this case, which, regardless of other considerations heretofore

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mentioned, would preclude plaintiff from any recovery on the note, or in another action. According to the evidence upon which the referee bases his report, Deardorf never charged the lumber, for which the firm note was given, to the firm of which the defendants were members. On the contrary, it was charged to Webster, individually, at his request, and the bills were made out, presented to and approved by Cottrel, whom Deardorf let have lumber at Webster's instance, and when those bills were approved by Cottrel, they were presented to Webster individually, for payment, at his request. In regard to the rule which renders a firm liable on a firm note, to a third person, at the instance of one of its members, it has been remarked by an eminent author that: "It is an essential portion of the rule that the person to whom the firm is to be bound should have dealt *bona fide*. If he who seeks to charge the firm was himself privy to a fraud—if he knew, or even if there were circumstances to induce a man of moderate discernment to believe, that the partner with whom he contracted had no authority to bind the rest, innocent members will not be allowed to suffer by his recklessness or stupidity." Smith's Merc. Law, 82. The fact that the accounts were opened against Webster alone at his request, would seem very strong to indicate and argue either that credit was not given to the firm of which he was a member, or else that there were circumstances sufficient to induce a man of "moderate discernment" to believe that Webster had no authority to bind the rest. The conduct and requests of Webster, in this respect were of so unusual a nature; so contrary to the ordinary course of business, as to excite suspicion, or at least provoke inquiry as to his authority to bind the firm, and render Deardorf's failure to make inquiry on this point, gross negligence, such as will preclude a recovery against the partnership on the note in suit; for, by the exercise of the minimum of diligence, he could have ascertained the truth of the matter, just as found by the referee, to-wit: that Webster had no authority to bind the

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firm by the note which he gave. Judge Story says: "Where a note has been made or indorsed by a partner, in violation of his duty and authority, if the holder who receives it has been guilty of gross negligence in receiving it, it will not be binding in his hands on the partnership." Story on Part., § 130. Looking at this subject, therefore, in the light of the authorities, the correctness of the doctrine of *Hickman's case* might be conceded and still hold that plaintiff's decedent, having been, by the circumstances of this case, put upon inquiry, which, if pursued, would have resulted in ascertaining that Webster had no authority to bind the firm, plaintiff cannot recover against that firm.

Therefore judgment reversed and cause remanded. NORTON and RAY, J.J., concur; HOUGH, C. J., and HENRY, J., concur in the result.

Separate Concurring Opinions.

HENRY, J.—I concur in reversing the judgment, but do not concur in so much of the foregoing opinion as holds that one member of a co-partnership, not a trading or mercantile co-partnership, cannot bind the firm by a note executed in the name of the firm, for articles or labor necessary in the business of the firm. I agree that such a note is not *prima facie* binding on the co-partnership, and that, in order to recover upon it as a firm note, the holder must show that the consideration was articles or labor necessary in the business of the co-partnership, or that it was executed with the consent of the other members.

HOUGH, C. J.—The defendants composed a non-trading firm. The articles of co-partnership contained the following provision: "Neither party shall give his individual note nor the note of the firm, for any purpose whatever for the use and benefit of the firm, without the consent of the other members of the firm." The articles for which the note in question was given were not furnished for the use of the firm, nor were they such as were necessary for the bus-

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iness of the firm, and no consent of the members of the firm to the giving of the note was shown. As I understand the record in this case, no question arises as to the burden of proof or as to the *quantum* of proof necessary to make a *prima facie* case for the plaintiff. I concur in reversing the judgment.

THE STATE v. LILLARD, *Appellant.*

Dramshops: "BITTERS;" UNITED STATES GOVERNMENT LICENSE. It is an offense against the Dramshop Act for a person not having a license as a dramshop keeper to sell as a beverage, and not for medicinal purposes, "bitters," compounded in part of intoxicating liquor; and it does not matter that an excise tax has been paid on them to the government of the United States, and that the act of congress does not require one dealing in them to have a license as a liquor dealer.

*Appeal from Schuyler Circuit Court.—Hon. ANDREW ELLISON,
Judge.*

AFFIRMED.

Knott & Gamble for appellant.

D. H. McIntyre, Attorney General, for the State.

RAY, J.—This was an indictment in the Schuyler circuit court for unlawfully selling intoxicating liquors, in quantities less than one gallon, without taking out a license as a dramshop keeper, and without having any license or legal authority so to do. The indictment was found at the March term, 1879, for a sale made in February preceding. The defendant pleaded not guilty. A trial was had before a jury, and the plaintiff, to sustain the issues on its side, offered evidence tending to show that the defendant in July,

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1878, sold to certain persons a "compound," of which intoxicating liquor was a part, as a beverage. The defendant also offered evidence in his behalf tending to prove that the compound sold, in this case, was a "bitters" composed of different medicines, authorized and stamped by the United States to be sold as a "bitters"—the same being a proprietary medicine—that the United States did not require the dealer to have a license as a liquor dealer to sell the same. This was all the evidence.

The court gave for the plaintiff several instructions to the effect that if the defendant unlawfully sold intoxicating liquors, in less quantities than one gallon, he was guilty, unless he believed, in good faith, the same was for medicinal purposes, and needed as such; that if defendant sold "bitters" of which whisky was a component part, and intoxicating, then the defendant is guilty, unless the same was sold for medicinal purposes and not as a beverage; that a United States government license does not authorize the defendant to sell "bitters" or intoxicating liquors in violation of the laws of the State.

The defendant asked an instruction to the effect that if the article sold, in this case, was a "bitters" put up by the defendant, and authorized and stamped by the United States as a medicine, then the jury must acquit, although said bitters contained liquor and was intoxicating; which the court refused to give.

The defendant was found and adjudged guilty; and after unsuccessful motions for new trial and in arrest of judgment, appealed to this court. The sole question is, did the court err in refusing the above instruction, asked by the defendant, or giving the converse thereof for the State.

The statute law of this State, in force at the date of the above indictment and sale, makes it a criminal offense for any person to sell intoxicating liquors, in any quantity less than one gallon, without a license for that purpose. 1 Wag. Stat., 549, § 2, chap. 48. The 27th section of the same chapter, page 554, also declares "That the term 'in-

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'toxicating liquors,' as used in this chapter shall be construed to mean fermented, vinous and spirituous liquor, or any composition of which fermented, vinous or spirituous liquor is a part, and all the foregoing provisions shall be liberally construed as remedial in their character." Yet, the foregoing instruction, asked by the defendant, asserts the proposition that if the article sold in this case was a bitters put up by the defendant and authorized and stamped by the United States as a medicine, then the jury must acquit, although said bitters contained liquor and was intoxicating. Such, manifestly, is not the law.

It has been expressly held elsewhere, that neither the payment of the United States excise tax, nor a license from the United States Internal Revenue Collector, will justify the sale of intoxicating liquors in violation of the laws of a state. In the case of the *State v. Delano*, 54 Me. 501, this doctrine is distinctly announced. So, also, in the case of *McGuire v. Commonwealth*, 3 Wall. 387, the Supreme Court of the United States held that a license granted by the United States, under the Internal Revenue Act of July 1st, 1862, to carry on the business of a wholesale liquor dealer, in a particular state named, does not, although it has been granted in consideration of a fee paid, give the licensee power to carry on the business in violation of the state laws forbidding such business to be carried on within its limits. The doctrine of these cases is applicable to the case at bar, and correctly states the law of this case.

For these reasons the judgment of the circuit court is affirmed. All concur.

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THE STATE ex rel. CRITTENDEN, Governor, v. WALKER, State Auditor.

Absence of Governor: RIGHT OF LIEUTENANT-GOVERNOR TO ACT. Temporary absence of the Governor from the State, in the discharge of duties imposed upon him by law, does not of itself authorize the Lieutenant-Governor to assume the functions and receive the salary of the Governor's office during his absence. See *People v. Parker*, 3 Neb. 409; *s. c.*, 19 Am. Rep. 634.

Mandamus.

PEREMPTORY WRIT AWARDED.

L. C. Krauthoff for relator.

D. H. McIntyre, Attorney General, for respondent.

NORTON, J.—This is a proceeding by mandamus to compel the State Auditor to audit the account of relator and draw a warrant for the salary of relator as Governor of the State for the month of May, 1882. The respondent, by leave of court, waived the issue of an alternative writ and filed a demurrer to the petition treating it as the alternative writ.

The effect of the demurrer is to admit the facts averred in the petition, but to deny their sufficiency to entitle relator to the relief prayed for. The facts admitted are substantially as follows, viz: That relator was absent from the State in the city of New York, from the 17th to the 27th of May, 1882; that relator was in said city, during said time, for the purpose of performing a duty imposed upon him by the constitution and laws of the State, namely, to inspect and examine certain securities deposited in the National Bank of Commerce of New York City, which bank had been duly selected as a depository of the bonds required to be deposited for the safe keeping of the public moneys of the State; and also in the performance of duties arising out of a certain action pending between Ralston and others and the said relator and other officers of the

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State, involving large and important interests to said State; that during the said absence of relator, Robert A. Campbell, lieutenant-governor, appeared at the executive office on the 25th day of May, 1882, and assumed the discharge of the duties of the office of governor, and continued in the discharge thereof until the 27th day of May, 1882, when relator returned to Jefferson City; that respondent refused to draw a warrant for the salary of relator for the period during which the said lieutenant-governor assumed the discharge of the duties of the said office.

The question presented, therefore, is, Can the governor who absents himself from the State for the purpose of performing duties imposed upon him by the constitution and laws of the State, be deprived of his salary during such absence. The attorney general, in an argument characterized for its plausibility and ingenuity, insists that he can, and basis his argument on the following section of the constitution: "In case of the death, conviction or impeachment, failure to qualify, resignation, absence from the State, or other disability of the governor, the powers, duties and emoluments of the office for the residue of the term, or until the disability shall be removed, shall devolve upon the lieutenant-governor." It is insisted that by virtue of this section, in case of the absence of the governor from the State for any purpose or for any period of time, however short, that *pro tempore* he ceases to be governor, and all executive functions, as well as the emoluments of the office, devolve upon the lieutenant-governor.

We are of the opinion that the construction contended for is too narrow, is not warranted by the section. Treating conviction or impeachment either as meaning conviction on impeachment, conviction of any crime as well as impeachment, it will be perceived that there are five specified causes, upon the happening of any one of which, the duties and powers, as well as the salary of governor, devolve upon the lieutenant-governor. It will be observed that four of these causes, viz., death, conviction on impeachment, failure

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to qualify and resignation, are of such a nature as absolutely to create a vacancy in the office; and all of the four are of such a character that no one of them can occur without its being a matter of such public notoriety as to be known throughout the State in twenty-four hours after the death, impeachment, failure to qualify or resignation occurs, thus not leaving in doubt or to conjecture the right of the lieutenant-governor to assume at once the performance of the duties and powers of the gubernatorial office and to receive the emoluments thereof.

In view of the fact that the death, impeachment, failure to qualify or resignation of the governor involves necessarily a vacancy in the office, and the further fact that whenever any one of the above events occurs, the right of the lieutenant-governor is not left open to question or doubt, it may well be insisted upon, as it is, by relator, that the fifth specified cause, viz., "absence from the State," does not mean either an absence from the State for the purpose of performing a duty imposed by law upon the governor, or a mere casual absence of a few days, but that it is necessarily implied from its connection with the other specified causes, that such absence must be of such a character as to indicate on the part of the governor, an abdication for the time being of the duties of the office, and such as, in the opinion of the governor, would make it necessary for him to call upon the lieutenant-governor to take his place and perform such duties as the condition of business in his office and the exigencies likely to arise might require during such absence, and when so called upon his authority to act could neither be questioned nor his right to the emoluments of the office denied until the governor returned and resumed his place.

Speaking for myself, and using the language of Ludeling, C. J., in the case of the *State ex rel. Warmoth v. Graham*, 26 La. Ann. 568; s. c., 21 Am. Rep. 551, when a like question was under consideration, I do not believe "that it was ever contemplated that the movements of the governor

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should be watched with a view that the lieutenant-governor * * should slip into his seat the moment he stepped across the borders of the state."

It is neither provided by the constitution nor by any law of the State, how the absence of the governor from the State shall be ascertained or made known either to the people or to the lieutenant-governor, so as to authorize him to assume the functions of the executive office or to impart knowledge of the fact to the people of his authority so that it may be recognized and unquestioned.

In the event of the death, impeachment, failure to qualify or resignation of the governor, no such difficulty presents itself. If the lieutenant-governor or auditor may assume to determine that any absence of the governor from the State, without reference to the purpose of the absence, or the character and extent of it, is such an absence as, for the time being, ousts him of his office, and casts upon the lieutenant-governor the powers, duties and emoluments of the office, why might they not, in passing upon the meaning of the words occurring in said section "or other disability of the governor," determine that he was disabled by reason of insanity without waiting for the judgment of the court pronouncing him insane, in a proceeding to determine that question, by inquest of lunacy.

The only authority we have found upon the question is the case of the *State ex rel. Warmoth v. Graham*, 26 La. Ann. 568, which was a proceeding by mandamus to compel the auditor to pay the warrant of the governor for his salary from the 6th to the 19th of May, 1871, and from the 26th of June to the 17th of July, 1871. The auditor refused to pay this warrant on the ground and for the reason that during said periods the governor was absent from the state, and that the duties of governor, as well as his salary, devolved upon the lieutenant-governor, to whom the salary had been paid.

Under the constitution and laws of Louisiana it is provided, as it is in our constitution, that in the absence of the

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governor from the state, or his inability to discharge the duties of the office, the powers and duties as well as the salary of the office, devolve upon the lieutenant-governor. It was held in that case that it was the duty of the auditor to pay the warrant, and as it is the only case in point we have been able to find, it is deemed not inappropriate to quote what was said by the court in the disposition of the question, which is as follows:

"It is evident if the lieutenant-governor be authorized to assume the functions of the governor, during any temporary absence of the governor from the state, he may also, whenever the governor is unable to attend to the duties of his office on account of sickness, in case of 'inability to discharge the powers and duties of the office.' We do not believe this to be the meaning intended by the framers of the constitution. The inability to discharge the duties of the office, as well as the absence from the state spoken of in the article, are such as would affect injuriously the public interest. The mere absence at Pass Christian, within a few hours run of the capital, could not, by any possibility affect the public interest. How is the absence of the governor to be ascertained? It is manifest that there ought to be some certain proof accessible to the public from which they may with certainty derive the knowledge as to who is authorized to act as governor of the state. As the law makes no provision for the mode in which the governor shall manifest to the public his absence from the state, it necessarily is left to his discretion, subject to his responsibility to the people. If the interests of the state should suffer in consequence of his prolonged absence, he would be amenable to public sentiment, and to the control of the impeaching power of the state. Some public record should be made of the intended absence, or the governor should publicly place the lieutenant-governor in charge of the government, so that the term of absence shall appear of record, and during such absence the acts of the acting gov-

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ernor would be of unquestionable validity. Anything less than this might create confusion and uncertainty."

The only difference between the above case and the one before us is, that it does not appear that the governor of Louisiana was absent from the state in the discharge of a duty imposed upon him by law, while in the case under consideration the governor was absent for the purpose of performing a duty which the law enjoined upon him in conjunction with others. And while the facts in the present case do not call upon us to go as far as the court went in said case, it may not be improper to say that the views therein expressed are not inconsistent with sound reason, and if an enlightened court under a constitution and laws, which, like our constitution, devolve the duties of the office of governor upon the lieutenant-governor in the event of the absence of the governor from the state, has determined, as it did in the case above cited, that the absence of the governor from the state for a limited time creates no such vacancy in the office as to authorize the lieutenant-governor to assume the duties and prerogatives, and receive the salary of the governor, it is at the very least persuasive authority for the soundness of the conclusion we have reached that the absence of the governor from the state, for the purpose of performing a duty cast upon him by law, did not authorize the lieutenant-governor to assume the functions of his office during such absence and receive his salary.

The demurrer of respondent is overruled and a peremptory writ awarded, in which all the judges concur, except SHERWOOD, J., who declines to sit.

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EYERMAN V. BLAKSLEY *et al.*, Appellants.

1. **Constitutional Law: Local Laws Changing the Rules of Evidence: Special Tax Bill.** The prohibition in the constitution against the general assembly passing any special or local law "changing the rules of evidence in any judicial proceeding," relates only to proceedings pending when the change is made. A city charter which makes special tax bills *prima facie* evidence of liability is not in conflict with this section, so far as respects bills issued after the enactment of the charter.
2. ——: **Local Assessments: Due Process.** Local assessments for sewers and other public improvements may be made without violating the constitutional provision that no person shall be deprived of life, liberty or property without due process of law.
3. **Sewer Ordinances in St. Louis.** There is nothing in section 22, article 6 of the charter of the city of St. Louis which makes it necessary that a sewer district shall be established by ordinance before the Board of Public Improvements can recommend or the Municipal Assembly can pass an ordinance for the construction of a sewer in such district. Hence, where the board recommended the passage of an ordinance for the construction of a sewer while the ordinance for the establishment of the district it was intended to drain was pending, and the two ordinances were passed and approved on the same day; *Held*, that the former ordinance was valid.
4. ——. Nor does said section make it the duty of the Board of Public Improvements in recommending the construction of a sewer to state specifically the reason for the recommendation. A declaration that it is made "in accordance with the provisions of the charter," is sufficient.
5. ——: **District Sewers.** The requirement of said section that every district sewer shall connect with a public sewer or some natural course of drainage, is sufficiently complied with if connection is made with another district sewer already constructed, of sufficient capacity and itself connecting with a public sewer.
6. **Municipal Corporations: Power to Impose Penalties: Special Tax Bill.** Municipal corporations have power to prescribe reasonable penalties for neglect or refusal to discharge any duty imposed upon a citizen by ordinance. On this principle a charter provision is held valid which allows the holder of a special tax bill fifteen per cent per annum if payment be not made within six months after demand.
7. **Appeals from St. Louis Court of Appeals.** In a case in which an appeal lies from the St. Louis court of appeals only because con-

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stitutional questions are involved, this court will consider those questions only.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

M. McKeag and P. Wm. Provenchere for appellants.

T. J. Cornelius for respondent.

HENRY, J.—Plaintiff sued defendants in the circuit court of St. Louis, on nineteen special tax bills issued for the construction of a district sewer in Sidney street sewer district number 3, in the city of St. Louis

Section 22, article 6 of the charter, provides: “District sewers shall be established within the limits of districts to be prescribed by ordinance, as approved by the Board of Public Improvements, and so as to connect with a public sewer, or some natural course of drainage. Such district may be sub-divided, enlarged or changed, upon the recommendation of the board, by ordinance, at any time previous to the construction of the sewer therein. The assembly shall cause sewers to be constructed in any district whenever a majority of the property holders resident therein shall petition therefor, or whenever the Board of Public Improvements shall recommend it as necessary for sanitary or other purposes.”

Ordinance number 10,717, as approved by the Board of Public Improvements, establishing Sidney street sewer district number 3, was passed by the assembly, and on the 3rd day of May, 1878, approved by the mayor. Ordinance number 10,720, recommended by the Board of Public Improvements, providing for the construction of the sewer in question, was passed by the assembly and approved on the 3rd day of May, 1878. The whole work of constructing the sewer and furnishing the necessary materials was let in one contract, and in advertising for the materials and work the quantity and quality of the articles necessary in its con-

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struction were not specified, nor were the articles and work let to the lowest bidder. The sewer in question did not directly connect with a public sewer, but connected with a district sewer which had a direct connection with a public sewer.

Section 25, article 6 of the city charter, provides that "Said tax bill shall be and become a lien on the property charged therewith, and may be collected of the owner of the land, in the name of and by the contractor, as any other claim, in any court of competent jurisdiction, with interest at the rate of ten per cent per annum, after thirty days from demand of its payment; and if not paid within six months after such demand, then at the rate of fifteen per cent per annum from the date of said demand." It also provides that "such certified bill shall in all cases be *prima facie* evidence that the work and material charged in such bill shall have been furnished, and of the execution of the work, and of the correctness of the rates or prices, amount thereof, and of the liability of the person therein named as the owner of the land charged with such bill to pay the same," with a proviso, that the party charged may by evidence contradict any fact of which the tax bill is declared *prima facie* evidence.

On the trial plaintiff, over defendant's objection, introduced the tax bill as evidence, it being admitted that the signatures of the city comptroller and president of the Board of Public Improvements were genuine. It was proved that plaintiff was the owner of the special tax bill sued on, and that demand of payment was made and refused March 15th, 1879.

Defendant offered in evidence ordinances numbers 10717 and 10,720, and ordinance 10,314, establishing the office of commissioner of supplies, and regulating the manner of purchasing all articles needed by the several departments of the city, and also testimony with regard to the recommendation made by the Board of Public Improvements, of

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the passage of ordinance number 10,720, which will be noticed hereafter.

Plaintiff had judgment in the circuit court, which was affirmed by the court of appeals; and defendants have appealed to this court, and contend that section 25, article 2 of the city charter, is in conflict with section 53, article 4, and section 30, article 2 of the constitution of this State; that ordinance number 10,720 was a nullity, because introduced and passed before ordinance number 10,717 was enacted, and because, when the Board of Public Improvements recommended the construction of the sewer in question, the sewer district had not been established, and because said board did not recommend it as necessary for sanitary and other like purposes; that the sewer in question did not, nor did the ordinance require it to, connect with a public sewer, or some natural course of drainage, and the ordinance was, therefore, of no validity; that the whole work of constructing the sewer and furnishing the materials was let in one contract, when the work and different materials should have been separately advertised, and let to the lowest bidder. We shall notice these points in the order in which we have stated them.

First, as to the alleged conflict between section 25 of the charter and the constitution. Section 53, article 4 of ^{1. CONSTITUTIONAL LAW: LOCAL LAWS changing rules of evidence: special tax bill.} the constitution, prohibits the general assembly from passing any local or special law, "changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, coroners, arbitrators or other tribunals, * * ." There are 33 subdivisions of that section, and appellant's counsel have not indicated with which of those subdivisions section 25 of the charter conflicts, but I presume from their objection to the introduction of the tax bill as evidence, that they hold so much of that provision of the charter as makes the tax bill *prima facie* evidence to be in conflict with the subdivision above quoted. That is an inhibition, not against any change of

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the rules of evidence, but against a change of the rules of evidence with respect to causes pending when the change is made. That is evidently the meaning of the language. The tax bill for sewerage work was made *prima facie* evidence by the ordinance of the city before the work in question was undertaken or the district established.

Nor is section 25 of the charter in conflict with section 30, article 2 of the constitution, which declares "that no person shall be deprived of life, liberty or property without due process of law." The substance of that provision has always been part of the organic law of this state, and city ordinances and acts of the general assembly providing for assessments for improvements, similar to the ordinance in question, have been upheld by repeated decisions of this court. In *Lockwood v. City of St. Louis*, 24 Mo. 21, Judge Leonard, who delivered the opinion of the court, said: "These special assessments are found in the English law, and have prevailed, it is believed, in most if not all of our American states, and their validity, when assessed as in this instance, cannot be questioned under our constitution." *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *Neenan v. Smith*, 50 Mo. 525; *Adams v. Lindell*, 72 Mo. 198.

The position is equally unsound, that ordinance number 10,720 is a nullity, because introduced before ordinance 10,717 took effect. While it is true that section 22, article 6 of the charter does not authorize the construction of sewers, except in established districts, yet, if when an ordinance authorizing the construction of a sewer takes effect, the district in which it is to be constructed is in existence, although the ordinance establishing the district and that authorizing the construction of the sewer take effect at the same moment, we do not see that the provision of the charter is violated. The assembly can authorize the construction of sewers in sewer districts, only when a majority of the property holders therein petition for it, or when the Board of Public Im-

3. SEWER ORDINANCES IN ST. LOUIS

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provements shall recommend it as necessary for sanitary or other purposes; nor can the assembly establish a sewer district except by ordinance as approved by the Board of Public Improvements; and when that board approves such an ordinance, we see nothing in the charter provision requiring the board to wait until the passage of that ordinance, before it shall recommend the construction of a sewer for the district. It is to be presumed that the board will not approve an ordinance to establish a district until the necessity for it is apparent, and when that is so it must be equally apparent that there is a present necessity for the construction of the sewer. If the board must wait until the ordinance establishing the district takes effect before it can recommend an ordinance for the construction of the sewer, the delay might result in serious consequences to the entire neighborhood. The importance of good and sufficient sewerage to the comfort and health of the inhabitants of the city forbids the narrow construction of the charter provision, which would occasion such delay in the construction of necessary sewers as might seriously impair the health of the localities in which they are needed.

Nor do we think the ordinance for the construction of the sewer void because the board in its recommendation did not state expressly that it was necessary for sanitary purposes or for what purpose. Before the ordinance was introduced, Mr. Flad, president of the board, by its direction, in a written communication to the municipal assembly represented that, in accordance with the provisions of the charter the ordinance in question prepared by said board was transmitted to the assembly with the recommendation of the board that the sewer be constructed. It was not stated in express terms that the sewer was necessary for sanitary purposes, but, if recommended in accordance with the provisions of the charter, the board must have considered, before recommending the improvement, that it was necessary for some purpose contemplated by the charter provision, deemed by the board sufficient.

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The construction placed by appellants' counsel upon the language of the charter "for sanitary or other purposes," is too narrow. Their contention is, that "other purposes," in that connection means "other like purposes pertaining to the health, or designed to secure the health of the city's inhabitants." The word "sanitary" embraces everything pertaining to the health of the inhabitants, and, if the words "other purposes" have no other meaning, they are superfluous. They have a broader significance, however, and there may be other purposes besides sanitary purposes, which may make the construction of a sewer necessary. And this is a matter for the consideration of the Board of Public Improvements and the municipal assembly.

It is further objected to ordinance number 10,720, that it did not provide that the sewer in question should connect with any public sewer or any natural course of drainage, but authorized a connection with another district sewer. The sewer with which it did connect had been constructed under an ordinance of the city and connected directly with a public sewer, and it was established by the evidence that its dimensions were two and a half by three and a half feet, and that it had sufficient capacity "to drain all area that ever can be drained into it." The charter provision does not require a direct connection between a district sewer and a public sewer, but only that it shall "connect with a public sewer or some natural course of drainage." It might be questioned whether the assembly can authorize the construction of a district sewer of greater capacity than necessary to drain the district in which it is constructed, at the expense of the property holders. They might object and resist the payment of the extra cost of such a sewer, or by timely proceeding, restrain the municipal authorities from its construction, but having been completed with capacity to drain an adjacent district, the property holders in the latter have

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no ground to object to the connection of their sewer with it. The city has no right to burden one sewer district with the expense of constructing a sewer larger, and necessarily more costly, than necessary to drain the district in which it is constructed. This is probably what prompted the insertion of the requirement in the section, that the district sewer should connect with the public sewer. But it cannot be that the assembly is not authorized, when it finds a district sewer already constructed with sufficient capacity to drain an adjacent district also, to connect the sewer in the latter district with the public sewer, through the sewer in the adjacent district.

The provision of the charter allowing the holder of the tax bill fifteen per cent per annum, if payment of the

6. MUNICIPAL CORPORATIONS : power to impose penalties: after payment is demanded and refused is special tax bill. tax bill be not made within six months of the nature of a penalty. It is not in-

terest. Interest at ten per cent per annum had been previously provided for, and although the fifteen per cent allowed by the ordinance in a certain contingency, is denominated "interest," it is in reality a penalty to secure prompt payment, imposed for neglect of duty; and municipal corporations have the power to prescribe reasonable penalties for the neglect or refusal to discharge any duty imposed upon a citizen by a valid ordinance. *Town of Tipton v. Norman*, 72 Mo. 380.

With respect to the mode of letting the contract, whether in accordance with or in violation of the ordinance

7. APPEALS FROM ST. LOUIS COURT OF APPEALS. establishing the office of commissioner of supplies and regulating the manner of pur-

chasing articles needed by the several departments of the city, no constitutional question is involved, but only the construction of an ordinance of the city, and inasmuch as if no other question were involved in the cause, defendant could not have had an appeal from the judgment to this court, we cannot consider that question on this appeal.

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Having disposed of all the questions in the cause upon which defendant's right of appeal was based, all concurring, the judgment is affirmed.

ROBINSON v. MUSSER, *Appellant.*

Volenti non fit Inuria. The maxim applied in a civil action for rape.

Appeal from Ray Circuit Court.—Hon. Geo. W. Dunn,
Judge.

REVERSED.

The plaintiff, Mary Robinson, testified that she was thirty-five years of age, that she resided with her father in Cameron, Clinton county, Missouri, and had resided with her father at that place for eight years; that her father's residence was on the opposite side of the street from defendant's residence; that she had known defendant and his family during the time she had resided with her father; witness and her father's family had been friendly and intimate with defendant's family, and that defendant and her father were intimate during the period aforesaid. At the time, and for some time previous to the defendant's conduct toward her, witness had been engaged in teaching school in the country, two and a half miles from Cameron; that while teaching the school she stayed at her father's and rode a horse backwards and forwards evening and morning to her school. My school was just out. A short time before my school was out, I was too unwell to teach, and Ella Musser, defendant's daughter, proposed to go and teach for me that day. I accepted her offer and she went. I remained at home. The next morning I was better, and my father came and told me my horse was out, and I could not

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get him, and that Mr. Musser would take me in his buggy and bring me back, as he was going to his farm beyond there. I accordingly went in the buggy with him out in the morning, and he called by for me in the evening, and I returned with him. Nothing unusual occurred on these trips. On the next day I rode home with him again in his buggy. This was the first idea I had that he intended anything wrong toward me. In going along after we left the school house, I spoke of going to the Centennial. Defendant said you had better go with me. I asked him if his daughters were going. He said no. I told him I could not accept such a proposal except from a relative or special friend. Defendant talked to me for ten minutes, and said if you will go with me as my wife I will pay your expenses ; spoke of his great love for me ; that he would give me a house and lot if I would be his special friend. I told him I did not want to hear such talk, and never to talk to me so again. When we got to Cameron he drove up to my father's gate and let me get out of his buggy. After supper he stepped into the front room of my father's house and kissed me. I brushed it off with my hand, and told him my father was in the back room ; he went into the back room where my father was, and I retired to my room upstairs. After I had fallen asleep I heard some one at my window say "Mary, Mary." It awoke me and I got up and asked who was there, and ascertained it was the defendant ; I asked him what he was doing there—told him he was an old fool—to get away from there. I could not see him. Defendant had climbed up to my window on a ladder. I told him if he disturbed me and did not get away I was going to my father and mother. I saw no more of him that night. My father was sick is the reason I made no outcry or noise that night. Defendant offered to take me to my school the next day. I wanted to go with him. I wanted to tell him what I thought of him. I had some talk for him, and I did talk to him harshly about coming to my window the night before, and reproved and rebuked him as

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severely as I could for his conduct. He appeared to be sorry, and made all the promises I could ask for his future good conduct. I told him, to prevent any scandal and talk on our account, of the respect I had for his family, and the promises he made me, I would say nothing about it, and act as though nothing had occurred. I returned home with him on Friday evening in his buggy. He came on Saturday morning to my school house with Misses Ella Musser and Ella Haven by previous appointment in defendant's carriage. I went with my father to school that morning. It was Saturday, the last day of my school. I returned that evening from the school in defendant's carriage about five o'clock. We stopped in Cameron as we passed through and took a glass of soda—it was very warm. I sat on the back seat with defendant in the carriage. When we got to defendant's house, or opposite there in the street, I got out of the carriage and took some flowers and books over home and came back to defendant's house, and staid until after supper. I then started home and got as far as the front gate of the yard, and Ella Musser, defendant's daughter, came out and threw her arms around me and insisted and pressed me to stay all night. I tried to excuse myself and go home, but she insisted and pressed me so strongly I finally consented to stay all night. We staid in the parlor of defendant from the time I went over that evening until Ella Musser and I retired to bed. The defendant and I were alone in the parlor a short time that evening while the girls were preparing supper. After Ella and I retired to bed about nine o'clock, we remained awake for sometime lying on the bed. It was extremely warm night; we lay on the top of the bed—with nothing over us. We had our gowns on. We were in the southeast room, up-stairs. There was a bed, small table, wash-stand, bowl and pitcher and a chair or two in the room. We put out the light. Ella Musser was sleeping with me. I was on the front side of the bed. Ella had gone to sleep. I remained awake until I heard the clock strike eleven, then

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dropped off to sleep. The first thing I heard was some one whispering in my ear, "Mary, Mary." It awoke me. It was Musser, the defendant. He put his arms under me, drew me off the bed and carried me to the south window. I made no noise or outcry for fear I would wake up Ella Musser, his daughter. I was not afraid of defendant's seducing or hiring me. I thought I was master of the situation. My idea was to get clear of him without having any scandal grow out of it. Said he wanted to talk to me—would not hurt me—kept pulling me along toward the door. I thought it best to get him out of the room for fear of waking Ella. He said he would not go unless I did. Very well, I said, I will go with you to the foot of the stairs. When we got there, without making any stop, he took me in his arms, carried me to his bed-room—said don't be afraid, I won't hurt you, and laid me down on his bed. He was elevated above me in a half reclining position; told me how much he loved me; how much he would do for me; how much money and property he would give; continued to importune me. I said to him, you are holding me here against my will—you have a wife—I am not that wife. If she knew this she would kill me, and would be doing right. Up to that moment I had no idea of force, or that he would use force. I used all the argument and reason I could command, and finally appealed to him on account of my situation arising from my monthly period. He all at once suddenly put his hand on my mouth and his weight was on me. The gown was raised up, the male organ made the entry, emitted the semen, and it was over very quick, instantaneous. I used all the force and means in my power to prevent it. I could not believe he would use force, and I knew I never would consent, and did not consent. As soon as it was over, he let me go, and walked with me to the foot of the stairway. I went up-stairs to the room where I had been sleeping—laid down on the bed. I lay there in great distress of mind. I could not determine what was best to be done, or what I should do. I knew if

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it was known it would produce great scandal and talk. I wanted advice. His daughter Ella was not awake. She did not exhibit any indications of being awake. I asked Ella the next morning if she was awake during the night, and said she was not. I lay there all night in great distress of mind; could not go to sleep until just before day I fell into a little doze of sleep. The semen had been dropped on the gown. Next morning I washed the gown, remarking to Ella I had soiled it a little. My father was sick at the time, mother was complaining very much. I did not tell them because I knew it would distress them. I did not tell my brother-in-law because he is afflicted with heart disease and could not be excited. I was afraid he might act rashly and kill Musser, the defendant. I reflected over the matter and dreaded the great scandal that would grow out of it, and was reluctant to make it public because of the scandal that I thought would grow out of it. The families had visited and been intimate and I respected Mr. Musser's family and daughters. I did not tell my mother because I knew it would distress her so much. After reflecting upon it I went to my best friend, Mrs. Harwood. I thought I could talk to her; that she was capable and would give me advice; told her all the circumstances and conduct of defendant toward me. She advised me to wait until her husband, Mr. Harwood, came home, and he would tell me what I had best do. I accordingly staid at her house and waited until he came and advised with him before I decided what I should do. I then determined upon my course—had a complaint made, and had the defendant arrested and determined to prosecute him and also brought this suit against him.

Upon cross-examination, she further testified: I was married at the age of twenty years; lived with my husband seven years, which terminated eight years ago. My husband left me and I got a divorce. There was one child born from the marriage, which has since died. My husband had been gone two or three years, traveling. I then heard

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of him no more; don't know where he is. My business had been taking orders for good books, teaching school, have traveled around some to see friends. At the time of this trouble and previous I was teaching school. In 1874 I formed the acquaintance of defendant and his family—have been intimate and friendly, until this occurrence. A fence divides our house and lot from Judge Stokes' on the same street; defendant's house is on the opposite side of the street. I always treated defendant with friendship. I met him before this at the depot at Gallatin and advanced across the depot and shook hands with him. After I got in the car and took my seat defendant came in, took a seat beside me on same seat and rode with me to Cameron, where we were going home. I did not invite him to take a seat by me. I was unwell, and defendant's daughter, Ella, went out and taught school for me one day. One morning my father came in and said to me, your horse is out and you will have to go with Musser to school to-day in his buggy, and I went with him. I went with him to my school in all, I believe six times. My school was two and a half miles in the country. He said nothing wrong nor made any advances until the third or fourth trip. I went with him three times after he had made the advances stated. After we got a short distance from the school house we began talking about the Centennial. He said I had better go with him; would pay all my expenses. I told him I could not accept such a proposal except from a relative or special friend. He said I must go as his special friend or his wife. There was more conversation, he making offers and promises which I could not accept. On the same evening he came to my father's house—I was in front room—and kissed me. I told him father was in the back room. He went in there; stayed a few minutes. My father was sick. On the same night about ten o'clock, I was barely asleep, I heard some one calling me, saying "Mary, Mary." It was defendant. He had climbed up on a ladder to the window. I found that it was Musser. I told him

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to go away, old fool, what was he doing there. He got down and went round to the front gate. I was in middle chamber where I was sleeping. I threw a shawl around me; went across the room to the window, about ten or twelve feet, and told him to go away, and if he did not go I would inform my father and mother. He said he wanted me to come down. I ordered him off; he went, I saw no more of him. The family had retired for the night. My brother had not come in; he was out in town; would have to pass through my brother's room to get to my room. Musser came to the east window. That room was not occupied. He used a long ladder to get up to the window. I am not sure what he said; being asleep, heard a noise which awakened me—found it was defendant. My brother had not come in. He was not at the window more than two or three minutes; did not remain at the gate longer than at the window. I met him next morning; am not certain whether at his house or my father's. He took me to school; went alone with him in his buggy. He came to my father's house in his buggy for me. We returned together alone in the buggy that evening. I wanted no one with us. I wanted to talk to him and tell him what I thought of him and warn him he must not do so any more. I did so in as plain terms as I could do. He promised me that he would not. I agreed with him, to keep down scandal and save the respectability of his family, I would say nothing of what had occurred and would be as we had been, and no one was to know anything about it. On Saturday morning, the last day of my school, Ella Musser, Ella Haven and defendant came out to my school in defendant's carriage. I went with father earlier than the others. On that evening I returned with defendant and the girls in defendant's carriage, riding on the back seat with defendant. We got into Cameron about five o'clock. It was oppressively warm and we took a glass of soda and drove down the street to defendant's house. I got out of the carriage at the same time with Miss Ella Haven. I went over to my

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house with some flowers and books in my hands and returned to defendant's house. We were all in the parlor; defendant in the parlor also. Defendant's two daughters went out to prepare supper, leaving defendant and myself alone in the parlor. How long we were there together I can't say. It was while the girls were getting supper. We were soon invited out to the dining room for supper. There was nothing wrong in the conversation between defendant and myself while in the parlor. We all sat down to supper-table together. After supper I proposed to go home and went out as far as the front gate, and Ella Musser came running out, threw her arms around me, and prevailed on me to go back and stay all night, which I did at her pressing request. Mrs. Musser, her mother, was on a visit to Kentucky. After sitting awhile in the parlor, Ella and myself retired to a room up-stairs for bed. It was not very dark nor very light in the room where we slept. We had gone to sleep when Musser came into the room. The defendant in calling "Mary, Mary," spoke in a very low tone of voice. It seemed he was trying to wake me without disturbing Ella. In taking me from the bed to the south window we knocked over the wash-bowl and pitcher, and I was afraid the noise would wake Ella. We talked some time at the window in a low voice. We talked there I suppose about five minutes. He said he wanted me to go down-stairs and have a talk with him. I admit I said I would go down to the foot of the stairs with him. In going down the stairs he kept me in advance of him. When we got to the bottom of the stairs we were at the entrance of the sitting-room which adjoins Musser's bedroom. I thought his object all the while was to coax or bribe me. I had no idea of him using any force. We had no talk at the foot of the stairs; took me right up and along and laid me on the back of the bed. I was lying on my back—he was sitting or reclining on the side of the bed in front of me. We were talking there on the bed—from ten to twenty minutes. I had on a long gown; had

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no other clothing on me. I lay in the same position all the time. He made propositions to reward me; told me how much he loved me. I told him I would not for all he was worth. I think the gown was raised up and all was done quick, instantaneously. There was something put over my mouth. I cannot tell how my legs were. The discharge of semen was after the penetration. It was a seminal discharge on the gown which I washed off the next morning. There was no chance to refuse at the bottom of the stairs, he took me right on without stopping. I resisted and protested all I could, and said all I could, made every appeal and finally appealed to him on account of my condition in my monthly sickness. It all did no good. I made no outcry and gave no alarm at any time because I thought it would create a great scandal, and I had great respect for the defendant's family, and thought it would involve all in great trouble and scandal. For this reason I made no outcry and made no alarm, and abstained from telling my father and mother because it would distress them. The next morning we were waked up about seven o'clock and went down to breakfast. Defendant, his daughter and myself all sat down at the same table as usual. I sat at the corner of the table next to the defendant—he sitting at the foot of the table. After breakfast I remained until between eight and nine in the morning and went home. There was nothing unusual with me that morning. I appeared and acted as usual; said nothing about what had taken place; did not go to church that day; remained at home; did not tell my mother or anybody else about what had occurred. Mrs. Harwood was the first one I told. She was my friend and told me what to do. On the first part of the week, Monday and Tuesday, after this occurrence, I went around visiting in Cameron as usual; went to Hiram Smith's and other places, as I had usually done, as though nothing had happened. I tried to be, and suppose was as cheerful as I had been before; did not show in my conversation or conduct that anything had happened. In the meantime I had

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not said a word to any person about it during this time. I was undetermined in my mind what I would do or what course I would take. I had a great horror for the scandal that I believed would grow out of it, and this was the reason for being quiet and saying nothing about it. I don't know whether I could have alarmed the neighborhood if I had made an outcry or made any noise, or give any alarm. Mr. Nelson, Mr. Stokes and my father lived close by, and other neighbors not far off. I did not try to arouse Mr. Musser's family because his daughters were young and I thought they ought not to know of the scandalous conduct of their father. I never stayed all night at Mr. Musser's when his wife was at home. Since she had been absent on this visit, I stayed there some two or three nights upon the invitation of his daughters when I stayed, and Mrs. Musser had requested me before she left to keep an oversight over them, and come and see them in her absence. I think I went to see Mrs. Harwood on Monday after occurrence, but she had company, and I did not get an opportunity to tell her until Tuesday night, when I told her all.

C. T. Garner & Son and Wm. Henry for appellant.

Chas. A. Winslow, J. H. Shanklin and J. T. Harwood for respondent.

SHERWOOD, J.—The petition in this cause is as follows : "Plaintiff states that she is a *femme sole* and of lawful age to bring this action, and for cause of action against defendant, states that on the 22nd day of July, 1876, she was a guest at the house of defendant in the town of Cameron, Missouri ; that while she was there as a guest as aforesaid, defendant assaulted and bruised plaintiff in a rude and insolent manner, and then and there forcibly, against the will of plaintiff, and in disregard of her entreaties to be released by defendant, and against such resistance as plaintiff was able to offer, defendant ravished and carnally knew plaintiff, to her great damage in body and health and men-

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tal anguish and humiliation, wherefore by reason of the premises herein set forth, plaintiff says she is damaged in the sum of \$25,000, for which she asks judgment and all proper relief."

The answer denied every allegation of the petition. We have read with great care the evidence herein, and as a summary of our views of the plaintiff's own testimony, feel constrained to say: "*Volenti non fit injuria.*" Burrill Law Dict., and cases cited. Judgment reversed. All concur.

WEBSTER, *Appellant*, v. SMITH.

St. Louis County: TAXES: SHERIFF AS EX-OFFICIO COLLECTOR. The sheriff of St. Louis county is in virtue of his office required to collect the revenue, but, when he does so, he does not act as sheriff. In a suit brought by him in his capacity of collector, and to his use as such, it was held that the process was properly served by him, as sheriff, and that, under an execution issued upon the judgment in his favor as collector, he properly sold the land and made the deed as sheriff; that, as sheriff, he was not a party to the suit for taxes, and that, as collector, his interest therein was not such as to disqualify him from acting in his capacity as sheriff.

Appeal from St. Louis Court of Appeals.

REVERSED.

Henry H. Denison and B. F. Webster for appellant.

Henry R. Watson for respondent.

HOUGH, C. J.—This is an action of ejectment. The plaintiff claims title under a deed from the sheriff of St. Louis county made to him as purchaser of the premises in controversy, at a sale under an execution issued to the sheriff upon a judgment against the owner, rendered in a

suit for back taxes under the revenue law of 1877, brought by "the State of Missouri at the relation and to the use of John A. Watson, sheriff and *ex-officio* collector of the revenue within and for St. Louis county." The owner of the land against whom suit was brought was a non-resident, and he was notified by publication. The circuit court rendered judgment for the plaintiff. The court of appeals reversed the judgment of the circuit court on the ground that the sheriff was interested in and a party to the suit for taxes, and that under section 3894 of the Revised Statutes relating to "sheriffs and their duties," the writ of execution should have been directed to the coroner, and having been directed to and executed by the sheriff, his conveyance to the plaintiff is a nullity.

Section 6837 of the Revised Statutes provides that all actions for taxes shall be prosecuted in the name of the State of Missouri at the relation and to the use of the collector. Sections 6838 and 6839 require the sheriff to sell the lands under execution, and to make deeds therefor. By section 92 of the act of 1872, (R. S., § 6732,) it is provided that the offices of sheriff and collector shall be distinct and separate offices in all the counties of this State. From the 12th day of December, 1836, until the adoption of the Scheme and Charter in 1876, the offices of sheriff and collector were, by virtue of special laws, distinct and separate offices in the county of St. Louis, and by section 7 of the Scheme for the separation of the city from the county of St. Louis, it was provided that the sheriff of St. Louis county should be *ex-officio* collector of the revenue of said county. In the case of the *State ex rel. Attorney General v. Watson*, 71 Mo. 470, this court held that the office of collector, as such, does not exist in the county of St. Louis. Notwithstanding the fact that the office of collector does not exist in the county of St. Louis as a distinct and separate office, it is too plain for argument, that the person who for the time being is sheriff of St. Louis county, is a collector of the revenue within the meaning of the revenue

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law; all the powers and duties of that officer, as prescribed by the revenue law, being by the scheme devolved upon the person who is sheriff. Scheme, § 33.

It must be observed that the duties required by the revenue law to be performed by the collector are not made a part of the duties of the sheriff, as such, but the person who is sheriff, is *ex-officio*, that is, by virtue of being sheriff, also required to collect the revenue as provided by law. When this person acts in the capacity of sheriff, he does not act as collector, and when he acts in the capacity of collector, he does not act as sheriff. That the same person may act in two different capacities under the revenue law, is shown by section 6732, Revised Statutes, which provides that the same person may hold both offices of sheriff and collector, and also by section 6847 which provides when said offices are held by different persons, that "the sheriff may appoint the collector his deputy sheriff, and, when so appointed, he may serve all process in suits commenced under this act with like effect as the sheriff himself might do."

When the collector is a deputy sheriff and serves process, in the service of such process he acts as sheriff, and not as collector. He sues as collector, and serves process as sheriff. So in the case before us, the duties of collector and sheriff being united in one person, and he being required to perform the duties of collector because he is sheriff, when he instituted suit, he could not describe himself in his petition as collector of St. Louis county, for there is no such distinct office as collector of St. Louis county, and in order to accurately set forth his right to sue, it was necessary that he should describe himself as sheriff, and *virtute officii* collector of the revenue. The suit, therefore, is a suit by Watson acting in the capacity of a collector under the revenue law, and not a suit by him as sheriff. As the collector himself may, when he is a deputy sheriff, serve process in a suit brought by him to his own use, it certainly cannot be said to be against the policy of the revenue law that when one

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person is both sheriff and collector, process may be served by him, as sheriff, in a suit brought to his use as collector. The statute evidently does not regard the interest of the collector in the result of a suit brought by him to recover the public revenue, as sufficient to disqualify him from serving the process in such suit.

The provision in section 6837, declaring that in suits to collect taxes, "the general laws of the State as to practice and proceedings in civil cases shall apply so far as applicable and not contrary to this chapter," under which it is claimed that the writ of execution should have been directed to the coroner, in our opinion relates to proceedings in court under the general practice act, and not to the statute regulating the duties of sheriff. The revenue law contemplates that the same person may be sheriff and collector, and yet provides in all cases, without exception, that the sheriff shall sell the land and make the deed; and, as we have seen, when said offices are held by different persons, the same person may sue and be authorized to execute process in such suit.

We are of opinion that the relator, as sheriff, was not a party to the suit for taxes, nor was his interest therein as collector such as to disqualify him for serving process therein as sheriff; and we are further of opinion that the writ of execution could not lawfully have been directed to or executed by the coroner, and that the sale was properly made and the deed properly executed by the sheriff.

The judgment of the court of appeals is, therefore, reversed. All the judges concur.

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LEVERING *et al.*, *Plaintiffs in Error*, v. SCHNELL.

1. **Fraud:** JOINT ACTION FOR RELIEF. Where parties having distinct interests have been made the victims of a fraud, the fact that the fraud was contrived against them all and the same means were used to deceive them all, will not entitle them to maintain a joint action for relief, unless it was through a joint transaction that the fraud was accomplished.
2. —— : REMEDY, AT LAW AND NOT IN EQUITY. The petition in this case examined and held to state a case for relief by an action at law for deceit, and not in equity.

Error to St. Louis Court of Appeals.—Reported in 9 Mo. App. 583.

AFFIRMED.

E. McGinnis for plaintiffs in error.

Henry Hitchcock for defendant in error.

PHILIPS, C.—This is a proceeding in equity. The petition discloses the following state of facts: Frederick W. Meyer died and his widow, Minna Meyer, was, by the St. Louis probate court, appointed his administratrix. E. Levering & Co., a partnership firm, had allowed against said estate a claim for \$4,242.50. Levering, Walker & Co., another partnership firm, had allowed against the estate a claim for \$4,229.50, both placed in the fifth class. John C. W. Schnell is the brother of the administratrix, and John Schnell is her father. The petition charges that the administratrix and the Schnells, knowing the estate to be solvent, entered into a conspiracy to falsely represent to creditors that the estate would not pay fifth class claims in full, so as to deceive creditors and buy their claims at less than their value, and secretly use the money of the estate therefor; that in pursuance of this scheme, they represented to plaintiffs, on September 10th, 1875, that the estate then had no money on hand, when, in fact, as defendants then well knew,

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it then had on hand not less than \$5,200; that the greater portion of the debts (about \$12,000) due the estate could not be collected, when, in fact, as defendants then well knew, the greater portion of the debts had then been collected; that, because of said facts, the estate would pay on fifth class claims only sixty cents on the dollar, and, in no event, more than seventy-five cents, whereas defendants then knew that all claims were worth their face value. Plaintiffs believed these said false representations, and were thereby induced, on September 10th, 1875, to sell their claims, amounting to \$8,850—jointly for \$5,100—to said John Schnell, as they believed at the time, but in fact the purchase was made by the administratrix, secretly, in the name of said John Schnell, and the \$5,100, used in making the purchase, was the money of the estate, and not that of the Schnells, as plaintiffs were made to believe.

That after plaintiffs were thus defrauded, the Schnells and the administratrix carried on their scheme of plundering the estate by bringing forward the Levering claims, in the name of said John Schnell as ostensible owner, and paying him the face of the claims out of the funds of the estate, and the illicit profit thus made was divided between the administratrix and the said Schnells; that they also procured an order from the court to sell the personality at private sale, and falsely reported to the court a much less sum than was actually received; that they speculated with the funds of the estate for their private gain, and made profits which they concealed from the court and creditors; that they procured real estate of the estate to be sold at private sale, and John Schnell was ostensibly the purchaser, but the administratrix was secretly the real purchaser, and at less than half its value; and, she having since died, said Schnells are now, as her devisees, the owners of said real estate.

That various false and fraudulent statements were made in the annual and final settlements, and the estate thereby made to appear to be partly insolvent, when it was

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wholly solvent; that all the matters of fraud and deceit were concealed by the administratrix and said Schnells from the court and the creditors; and the administration was closed and the administratrix discharged in July, 1877; that plaintiffs first learned in the summer of 1878 of the fraud that had been practiced on them and the estate; that all other demands against said estate, except those of plaintiffs, and one of \$147.57 in the sixth class, have been paid in full. The owners of said sixth class claim (Wm. Schotten & Co.) are made defendants.

The relief asked by plaintiffs is, that the balance of their claims be adjudged to be paid, and that defendants, Schnells, be charged as trustees for the money received by themselves and administratrix from the estate on the Levering claims; for the money from sale of personal property and not accounted for; for profits made in speculating, and for said real estate now held by said Schnells, all as unadministered assets fraudulently acquired by them, and, therefore, charged with a trust for the benefit of the creditors suffering from the fraud.

To this petition John Schnell demurred, alleging that no cause of action was stated, and that several causes of action were improperly united. Defendant John C. W. Schnell being a non-resident, has not yet been served with process. The court sustained the demurrer. Plaintiff's declining to plead further, final judgment was given for defendants, and the case was taken to the court of appeals, which affirmed the judgment of the circuit court. The case is now here on writ of error.

I am unable to perceive the necessity or propriety of the two firms joining in this action. They constitute separate partnerships, their claims are distinct,
^{1. FRAUD: joint action for relief.} and there is no such community of interest between them as to require a joint action. True, the petition alleges a combination between the Schnells to defraud the creditors of the fifth class, and the same false representations were made to the plaintiffs to induce their acceptance

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of the offered sum for their claims. But there was no joint proposition made them. The acceptance by one was by no joint arrangement made to depend upon the acceptance of the other. Nothing is alleged to show that the action of one was influenced by that of the other. No unity in time nor transaction. Each firm in the matter preserved its individuality, and had its separate cause of action, independent of the other, and might proceed without the consent or presence of the other. Their injuries were distinct. The practice act certainly gives no countenance to such joinder of parties plaintiff. "All persons having an interest in the subject of the action," applies of course to a community of interest in the one action, and not to a case where A has his own cause of action, and B has no right to or interest in A's claim, but has his own independent claim. Because they have both been separately defrauded by C and seek relief against him, this statute does not authorize them to join in one action. It is not the case of several creditors joining in a creditors' bill to reach the funds of a debtor held in constructive trust as a common fund for all the creditors. The distinction is too palpable to demand amplification. In equity practice parties having a common interest may unite where the subject matter of litigation arises out of the same transaction, but not separate transactions. Story Eq. Plead., (9 Ed.) § 279. In *Comby v. McMichael*, 19 Ala. 752, it is held that parties having joint interests in property and equities among themselves, cannot join in a bill in equity to redress an injury done to their joint legal estate. Why then may they join in a bill to redress an injury done to their separate legal estate?

Aside, however, from the question of misjoinder of actions, can this proceeding in equity be maintained? It ^{2. — : remedy, at law and not in} is a familiar principle that where the party ^{equity.} has an adequate and complete remedy at law, equity jurisdiction cannot be invoked. Stripped of its cumbrous statement and surplus phrasing, and reduced *in puris naturalibus*, what is this case but that A and B,

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contriving to obtain the goods of C and D at less than their value, accomplished their fraudulent design by deceit and falsehood? The common law action on the case for deceit is especially applicable. In it all the essential facts could be developed. What is the injury to plaintiffs complained of? Simply that by reason of defendants' deceit and falsehood they were induced to part with \$8,850 worth of property for \$5,100. This, as to them, is the whole gravamen of their complaint. The recovery of \$3,750, or \$1,875 each, and interest, from the defendants, is all they are entitled to. If the remedy at law is adequate to this end, the remedy is effectual and complete. There remains then nothing to call into action the extraordinary functions of a court of chancery. *Thompson v. Manly*, 16 Ga. 440, 442; *Echols v. Hammond*, 30 Miss. 177; *Moore v. Wingate*, 53 Mo. 411, 412; *Coughron v. Swift*, 18 Ill. 414; *Janney v. Spedden*, 38 Mo. 402; *Norwich v. Storey*, 17 Conn. 364.

The allegations of the petition that the administratrix speculated in the funds of the estate, improvidently administered it, and managed to appropriate by unauthorized sales the real estate, are wholly immaterial. This is not an action for waste, nor for marshalling assets. The petition distinctly avers that there were sufficient assets on hand to pay the claims in full, and that as a matter of fact the administratrix did pay them out of the moneys of the estate to the fraudulent assignees. So had plaintiffs not assigned their claims they could have enforced payment from the administratrix as such. Through the fraud of defendants they lost so much money by making the assignment, and for that injury, if any, they had a complete remedy at law.

The demurrer was well taken. The judgment of the court of appeals and of the circuit court are, therefore, affirmed. MARTIN, C., concurs; WINSLOW, C., absent.

Fields v. Maloney.

FIELDS V. MALONEY *et al.*, Plaintiffs in Error.

Change of Venue: JURISDICTION CONFERRED BY: PARTITION: EJECTMENT: AMENDMENT: ERROR APPARENT ON THE FACE OF THE RECORD. Where an action was brought in Sullivan county for partition of land in that county and for an accounting for rents and profits and use and occupation of the land, and afterward by change of venue the case was sent to Livingston county and by leave of court in that county, an amended petition in ejectment was filed, with a prayer for damages for detention of the premises, and for the monthly value of the rents and profits, and the case was tried on this petition, without objection from the defendant, and judgment rendered for plaintiff; *Held*, (1) That the change of venue vested in the Livingston court jurisdiction, not of the land for all purposes, but of the cause of action set out in the first petition, viz: the suit for partition of the land, and jurisdiction of that only, and consent of the parties could confer no other jurisdiction; (2) That the petition in ejectment was not an amendment of the first petition, but was an abandonment of the cause of action stated in that petition and the substitution of a new cause, and the court acquired no jurisdiction thereof; (3) That under the statute the Livingston court had no original jurisdiction of suits in ejectment for land in Sullivan county; (4) It results that it was error to render judgment for plaintiff on the amended petition, and as the error was apparent on the face of the record, it was fatal, though no exception was taken in the trial court.

*Error to Livingston Circuit Court.—HON. E. J. BROADDUS,
Judge.*

REVERSED.

A. W. Mullins for plaintiffs in error.

C. H. Mansur for defendant in error.

RAY, J.—It appears by the record that two distinct suits between the parties were originally commenced in the circuit court of Sullivan county, where, by order of court, they were afterwards consolidated. After the consolidation, the plaintiff, by leave of court, filed an amended petition, the object and purpose of which was the partition of

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a certain tract of land, situated in Sullivan county, among the parties to this consolidated action ; and, also, to compel defendants to account to plaintiff for his share of the rents and profits, and the use and occupation of the same. After that, this cause of action, in said consolidated suit, by order of the Sullivan circuit court, was transferred to the circuit court of Livingston county, by change of venue, in due form. After the cause reached the Livingston circuit court, the plaintiff, by leave of court, filed a second amended petition, in the nature of an action of ejectment, to recover from defendant the possession of his undivided interest in the same tract of land, situated as aforesaid, in Sullivan county, together with the monthly value of the rents and profits, and damages for the detention of the same, in the ordinary way. To this second amended petition the defendants filed answers ; first, in the nature of a general denial, and secondly, setting up the ten year statute of limitation. A trial was had upon this second amended petition, in the Livingston circuit court, which resulted in a finding and judgment for the plaintiff, from which the defendants, after unsuccessful motions for new trial and in arrest, appealed to this court.

The controlling question is, whether the Livingston circuit court had or acquired jurisdiction of the subject matter of the cause of action set out in the second amended petition.

The action thus stated, it will be seen, is ejectment. The subject matter a tract of land, situated, not in Livingston, but in Sullivan county. Section 3483, Revision of 1879, provides that : "Suits for the possession of real estate, or whereby the title thereto may be affected, shall be brought in the county within which such real estate, or some part thereof, is situated." It is clear, therefore, that the Livingston circuit court had no original jurisdiction over the subject matter of the cause of action in said second amended petition. It is contended, however, that it acquired jurisdiction by reason of the proceedings originally

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commenced in the Sullivan circuit court, and regularly transferred to the Livingston circuit court by change of venue, as aforesaid.

It may be conceded that the transfer from the Sullivan to the Livingston circuit court was regular, in this case. It may be also conceded that, after the transfer, the cause may be prosecuted to final judgment, as if no change of venue had occurred, and that any amendment permissible in the former is allowable in the latter. But, in neither court, can a plaintiff so amend as to state an entirely new cause of action. The rule is, that the previous pleading must show that the cause of action presented in the new pleading is the same as that upon which the action was originally based. The courts are always liberal in allowing amendments, so long as the original cause of action is not changed thereby. This position is abundantly supported by the following authorities: *Bliss on Code Plead.*, § 429; *Lottman v. Barnett*, 62 Mo. 159; *Gibbons v. Steamboat Fanny Barker*, 40 Mo. 253; *Milliken v. Whitehouse*, 49 Me. 527; *Cooper v. Waldron*, 50 Me. 80; *Sumner v. Brown*, 34 Vt. 194; *Steffy v. Carpenter*, 37 Pa. St. 41; *Snead v. McCoull*, 12 How. 407, and *Walden v. Bodley*, 14 Pet. 156.

It may likewise be conceded that all amendments, that are germane to the original proceeding, and all pleadings, the purpose of which is to substitute another cause of action, of which the court has jurisdiction, are matters of exception, to be saved by bill; but where the new petition filed under the guise of amendment, sets forth a different cause of action, of which the court has no jurisdiction, and that fact appears upon the face of the new petition, the action of the court in permitting it to be filed, and rendering judgment upon it is a matter of error, and may be reviewed here, without saving any exceptions. *Bateson v. Clark*, 37 Mo. 34. And it may be further conceded, that if the cause of action contained in the second amended petition, is the same, though modified, as that set out in the first amended petition, then the Livingston circuit court

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retained all the jurisdiction of the subject matter it originally acquired, by reason of the change of venue from Sullivan to Livingston, and for the purpose of the cause of action so transferred, held it as effectually as the Sullivan court originally possessed it.

The solution of the question, therefore, depends largely upon the fair construction of these two amendments, but more especially upon the effect of the second amended petition. If it can justly be held that the cause of action set out in the second amended petition, is the same as that contained in the first, then the Livingston circuit court had jurisdiction. But if it should be held that it substituted therefor an entirely new and distinct cause of action, (of which we think there can be no question,) over the subject matter of which the Livingston circuit court had no jurisdiction, then its judgment is void.

That an action for the partition of a given tract of land, by one joint tenant against the others, (and also to compel them to account for rents and profits, or use and occupation,) is not the same as an ordinary action of ejectment, by one of said tenants against the others, for the recovery of his undivided interest therein, (including the monthly value of the rents and profits, damages, etc.,) we think too plain for argument. That the Livingston circuit court had no original jurisdiction of an action of ejectment for a tract of land situated in Sullivan county, is equally clear. R. S. 1879, § 3483. It follows, therefore, that the second amended petition in this case was the substitution of a new cause of action, and not an amendment of the original cause set out in the original amendment. It operated as an abandonment of the cause of action transferred from Sullivan to Livingston, and substituted in lieu thereof a new cause of action, over the subject matter of which the Livingston circuit court had neither original nor acquired jurisdiction. In this case, the entire record, in point of fact, is before us, and we fail to see how rule 13 of this court—74 Mo. Rep. at close of volume—can be of any avail to the plaintiff,

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since, if the clerk had strictly complied with the rule, the want of jurisdiction over the subject matter would still have been manifest on the face of this second amended petition, and nothing to show a change of venue. As this want of jurisdiction appears on the record proper, no bill of exceptions is necessary to enable us to review it. Neither is it waived by appearance and answer; nor can it be conferred by consent or agreement of parties; but only by the law. It may also be taken advantage of at any stage of the proceeding, either in the lower court or that of last resort. These positions are fully sustained by the following authorities: R. S. 1879, § 3519; Freeman on Judg., §§ 118, 121; *Brown v. Woody*, 64 Mo. 547; *Bray v. Marshall*, 66 Mo. 122; *Henderson v. Henderson*, 55 Mo. 534; *Stone v. Corbett*, 20 Mo. 350; *Dodson v. Scroggs*, 47 Mo. 285.

For these reasons, the judgment of the circuit court is reversed and remanded. All concur except NORTON and SHERWOOD, JJ., who dissent.

HOUGH, C. J., CONCURRING.—*Bray v. Marshall*, 66 Mo. 122, was an action of ejectment for lands lying in Dade county. The cause was tried in the Greene circuit court without objection from either party. Nothing appeared in the record showing that the Greene circuit court had acquired jurisdiction of that action in the manner provided by the statute, and on appeal the point was made for the first time in this court, that the proceedings in the Greene circuit court were *coram non judice*. This court decided, all the judges concurring, that the Greene circuit court had no jurisdiction of the action. A similar ruling was made in *Jacks v. Moore*, 33 Ark. 31. Parties cannot go to the city of St. Louis, and by agreement between themselves institute and try in the circuit court of that city an action of ejectment for land lying in the City of Kansas; and if it be permissible to suppose that the circuit court of that city would take cognizance of such a suit, its action in so doing would constitute error on the face of the record.

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The change of venue from Sullivan county to Livingston county gave the Livingston circuit court jurisdiction over the land lying in Sullivan for the purpose of hearing and determining the suit in partition only, and not for any other purpose whatever. The Livingston circuit court had no jurisdiction over any cause of action affecting land in Sullivan county, except such as had been transferred to it. The cause of action transferred was an alleged right to partition of certain lands in Sullivan county. Jurisdiction of this cause of action could not have been acquired by the Livingston circuit court by consent of parties. It could only have been acquired, as it was, by an order of the Sullivan circuit court changing its venue to Livingston county. *Henderson v. Henderson*, 55 Mo. 534. The transfer of jurisdiction of this cause of action did not also confer jurisdiction of a suit to enforce specific performance of a contract of sale of said land, or of a suit to enforce a vendor's or mechanic's lien against said land, or of an action of ejectment for said land, and the consent of parties could not confer jurisdiction of either of these causes of action on the Livingston circuit court. In an action concerning the possession of land or the title thereto, the land is not of itself and by itself, the subject matter of the action, any more than money is the subject matter of all actions, the judgment in which must be satisfied in money, and the fact that the Livingston circuit court acquired jurisdiction over said lands in Sullivan county for one purpose did not give it jurisdiction over said lands for all purposes. The Livingston circuit court has no general jurisdiction over actions of ejectment; its original jurisdiction in such cases is limited to lands lying in Livingston county. The subject matter of the action which was transferred by change of venue was not the subject matter of the action which was tried. The subject matter of the action which was transferred was the right to a partition of the land in question; the subject matter of the action which was tried, was the right of possession of said land without partition thereof.

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As the circuit court of Livingston county had neither original nor acquired jurisdiction of the action of ejectment for lands in Sullivan county, its judgment cannot be permitted to stand.

The case of *Ulrici v. Papin*, 11 Mo. 42, is not at all analogous to the present. When a suit affecting lands lying in several counties is brought in one of such counties where it is alleged the greater part of such lands lie, and the contrary does not clearly appear from the petition, objection to the jurisdiction must of course be taken by plea in the trial court. Whether the greater part of the lands lie in the county in which the suit was brought, may be in some cases a question of fact to be passed upon by the court trying the cause, and when the court renders final judgment in such a cause, that question becomes *res judicata*, like any other question of fact necessarily involved in the judgment, and such judgment is not thereafter subject to collateral attack. *Chouteau v. Allen*, 70 Mo. 290, sheds no light on this case. The statute expressly authorizes suits to foreclose mortgages on real property to be brought in any county in which any portion of the mortgaged premises is situated. Where the suit is so brought the court acquires jurisdiction of the cause, and such jurisdiction will not be forfeited because the court may not render judgment against the land lying in the county where the suit is brought. When there are two mortgages on the same land the foreclosure of the first in no manner affects the jurisdiction of the court over a suit to foreclose the second. Suit may still be brought on the second mortgage in any county in which any portion of the land included in the second mortgage is situated. This was done in *Chouteau v. Allen*, and the statute was sufficient authority for it. The cases cited in argument involving the question of jurisdiction of the person have no possible relevancy to the case at bar. I concur in reversing the judgment and remanding the cause.

SHERWOOD, J., DISSENTING.—I dissent because I regard the foregoing opinions radically wrong. These are my reasons :

When the cause was taken by change of venue from Sullivan to Livingston county, the mandate of the statute was that it should be “proceeded in and determined as if it had originated therein.” R. S. 1879, § 3736. And the Livingston circuit court, by reason of the transfer, had the right, power and authority to proceed to final judgment in the cause in the same manner, to all intents and purposes, as if the cause had arisen in Livingston county. Ib., § 3741. If the cause of action had remained in the county where it originated, no one would question that if plaintiff had amended his petition, or, if you please, by such amendment, changed his cause of action, and the defendants had answered to the merits and gone to trial, the judgment would have been binding upon them. *Ward v. Pine*, 50 Mo. 38.

As already seen, section 3736, *supra*, provides that when a cause is sent by change of venue to another county, it shall be “proceeded in and determined as if it had originated therein.” The effect of the change of venue, therefore, to all intents and purposes, was the same, so far as concerned the power of the Livingston circuit court, as if the land over which the controversy arose, had been bodily transferred to Livingston county, and the territorial limits of that county had been enlarged by such addition. If the court whence the cause came, could have allowed the amendment or the change of the cause of action, then, so, also, could the court to which the cause was taken—or else the statute means not what it says, and the power of amendment is lost by reason of the change of venue—which is an impossible supposition.

But waiving all the above, I confidently maintain that the Livingston circuit court had jurisdiction over the “subject matter of the action,” and this regardless of any ques-

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tion of change of venue, and that this being true, any irregular exercise of such jurisdiction could only be taken advantage of by a plea to the jurisdiction, and that such plea is as necessary in local as in transitory actions, and that if such plea be not made before pleading to the merits, it will be too late to raise the point. 2 Saund., 209, n. 1; *Hembree v. Campbell, infra*, and cases cited; 1 Tidd Prac., 630, and cases cited. Thus, tenant or defendant may plead to the jurisdiction of the court, that the land is ancient demesne, or "that the land is within a county palatine; lies in a franchise *ubi breve domini regis non currit.*" Com. Dig., p. 32; Tit. Abatement; *Doe v. Robinson*, 2 Str. 1120.

In Vermont, some sheep were replevied in Orange county, but the suit was brought in Washington county, and the writ made returnable to the county court of the latter county. Poland, C. J., speaking of the action, says: "The statute also provides that the writ shall be returnable to the county court for the county in which the goods are detained. The action being to recover personal property, is of a transitory character, and except for this provision of the statute, might well be brought in any county where either of the parties lived. The general provision of our statute in relation to actions brought to the supreme and county courts, is, that they shall be brought in the county where one of the parties resides; and suits before justices of the peace shall be brought in the town where one of the parties lives; but it was never supposed that, if brought in some other county or town, it was a case of want of jurisdiction, so that if the action proceeded to judgment, the judgment would be void. *University v. Joslin*, 21 Vt. 52. We regard this case as being precisely of the same character, and that the ground on which this case was dismissed, was an objection to the particular process, and not a lack of jurisdiction over the subject matter. In *Hall v. Gilmore*, 40 Me. 578, under a statute precisely like ours in this respect, it was decided that if the suit be brought in the wrong county, the error, to be available to the defend-

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ant, must be shown in abatement." *Collamer v. Page*, 35 Vt. 387. In Maine the action of replevin is regarded as local.

In *McMinn v. Hamilton*, 77 N. C. 300, Faircloth, J., said: "Where a court has no jurisdiction of the subject matter, the objection can be taken at any time, and indeed as soon as this fact is discovered the court *mero motu* will take notice of it and dismiss the action. But if it has jurisdiction of the subject matter and the venue is wrong, the objection must be taken in apt time; and if the defendant pleads to the merits of the action, he will be taken to have waived the objection. He cannot have two chances." So, also, where a foreign corporation was improperly served with process, and pleaded to the merits, it was held too late subsequently to raise the point of jurisdiction. *Ward v. Roy*, 69 N. Y. 96.

In *Hembree v. Campbell*, 8 Mo. 572, an action of trover was brought in Dade county, but process was served on the defendant in Polk county. He appeared and pleaded to the merits, but after that successfully moved to quash the writ, and Scott, J., said: "The question is, whether the motion was properly sustained by the court below? The statute regulating practice at law directs, that a suit instituted by summons or capias shall be brought, when the defendant is a resident of the State, either in the county within which the defendant resides, or in the county within which the plaintiff resides and the defendant may be found. It was clearly illegal for a plaintiff residing in Dade county to bring suit against a party residing in another county. But the circuit court of Dade county is a court of general jurisdiction; it had jurisdiction of the subject matter of this suit; and if the defendant being served with the process, appeared and pleaded to the merits of the action, thereby acknowledging jurisdiction of his person, he would not be allowed afterward to object to the regularity of the proceedings." So, also, in *Powers v. Browder*, 13 Mo. 154, an action of debt removed by change of venue from Benton

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county to Polk county. The affidavit was irregular, but no point was made on it till several steps were taken, and Napton, J., remarked: "That the circuit court of Polk county had jurisdiction of the subject matter of this suit, is beyond dispute. The voluntary appearance of the defendants during the progress of the cause, subsequent to its removal to Polk county, gave the court of that county jurisdiction over their persons." So, also, in *Ulrici v. Papin*, 11 Mo. 42, where the then existing statute required that "suits in equity concerning real estate or whereby the same may be affected, shall be brought in the county within which such real estate or a greater part thereof is situate," and by demurrer to the bill it was objected that the suit was not brought in the proper county in conformity with the statutory provision. Judge Scott remarked: "That it does not clearly appear where the greater part of the lands lie. This objection, if tenable, should have been raised by a plea to the jurisdiction." So, also, in *Chouteau v. Allen*, 70 Mo. 290, there were two mortgages on lands in Mississippi and other counties. The lien of the State, being a prior incumbrance, was foreclosed, as to land in that county, and of course left no land in that county on which foreclosure proceedings based on the second mortgage could operate. The statute then in force provided that in suits for the foreclosure of mortgages of real estate, "the petition may be filed in any county where any part of the mortgaged premises is situate." 2 Wag. Stat., § 3, p. 954. And it was strenuously pressed upon our attention, that inasmuch as the suit for the foreclosure of the second mortgage was brought in Mississippi county, and no foreclosure asked as to lands in that county, but only as to lands in adjacent counties, that, therefore, the circuit court of that county had no jurisdiction. But we held otherwise, even on a motion for rehearing, remarking: "After a court, which has general jurisdiction over a certain class of causes, proceeds without objection to the hearing of a cause belonging to that class, it is quite too late in this court to raise

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objections to the irregular exercise of such jurisdiction; such objections, even if originally valid, lose their force when waived by pleading to the merits. And we can discover no difference in principle between this case and that of *Hembree v. Campbell, supra.*" The cases of *Chouteau v. Allen* and *Ulrici v. Papin*, would seem decisive of this one. Of course mere failure to plead to the jurisdiction, where the court had none, could not create a jurisdiction. And this is what is meant when it is said that "consent of parties cannot confer jurisdiction." *Stone v. Corbett*, 20 Mo. 350.

What is that something called in section 3519, "jurisdiction of the court over the subject matter of the action?" I answer that question in this way: It is the authority conferred by law upon certain courts to hear and determine a certain class of causes. This power thus conferred, is conferred by the law alone, and never can be conferred by the parties. It exists always in the courts, although it can only be brought into exercise by the service of process or the appearance of the parties. When such a court having jurisdiction over a certain class of causes, conferred in a manner as aforesaid, issues its process in a cause belonging to one of those classes, and the process is served, or the parties to the particular suit voluntarily appear to the suit, and no timely objection is taken to the exercise of jurisdiction by the court, the judgment rendered is a finality, whether the "jurisdiction of the court over the subject matter of the action," be regularly or irregularly exercised. These views of mine are fully supported by the authorities I have cited, as well as by a recent case in New York, *Hunt v. Hunt*, 72 N. Y. 217; *s. c.*, 28 Am. Rep. 129, where Judge Folger says: "Jurisdiction of the subject matter, is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question. One court has jurisdiction in criminal cases; another in civil cases; each in

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its sphere has jurisdiction of the subject matter. Yet the facts, the acts of the party proceeded against, may be the same in a civil case, as in a criminal case—as for instance, in a civil action for false and fraudulent representations and deceit, and in a criminal action for obtaining property by false pretenses. We should not say that the court of civil powers had jurisdiction of the criminal action, nor *vice versa*, though each had power to pass upon allegations of the same facts. So that there is a more general meaning to the phrase ‘subject matter’ in this connection, than power to act upon a particular state of facts. It is the power to act upon the general, and so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. A suitor for a judgment of divorce may come into any court of the state in which he is domiciled, which is empowered to entertain a suit therefor, and to give judgment between husband and wife of a dissolution of their marriage state. If he does not establish a cause for divorce, jurisdiction to pronounce judgment does not leave the court. It has power to give judgment that he has not made out a case. That judgment would be so valid and effectual as to bind him thereafter, and to be *res judicata* as to him in another like attempt by him. If that court, however, should err, and give judgment that he had made out his case, jurisdiction remains in it so to do. The error is to be corrected in that very action. It may not be shown collaterally to avoid the judgment, while it stands unversed, whether the judgment be availed of in the state of its rendition or a sister state; granted always that there has been jurisdiction of the parties to it. The judgment is in such case, also, *res judicata* against the party cast in judgment. The relevancy of this discussion will appear when we come to consider more particularly some of the points made by the plaintiff. We conclude that jurisdiction of the subject matter is the power lawfully conferred to deal with the general subject involved in the action.”

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One can easily suppose a case where a rule different from that I have announced, would work incalculable hardship and bring reproach upon the name of courts of justice. Lands lie in several counties. A suit for partition of those lands is brought "in the circuit court of the county in which any portion of the premises are situate." R. S. 1879, § 3340. Process is duly served or the parties voluntarily appear and final judgment of partition is had, and the lands sold to strangers. Years afterward, but before the statute of limitation has run, it is discovered, upon a more accurate survey of county boundaries, that none of the lands lie in the county where suit was brought. Are those proceedings to go for nothing? Is that solemn adjudication *coram non judice*? I trow not. Or suppose that suit for partition of lands lying in one county is brought in the circuit court of that county; change of venue taken to another county, and when the transcript gets there, it is suddenly discovered that there are some unknown parties who have an interest in the lands. As to them, of course, no change of venue has been taken, and the court to which the cause has been taken has as to them, according to the theory of the majority opinion, no jurisdiction. What is to be done? Of course, if that opinion stands for law, even the voluntary appearance of the hitherto unknown parties to the action; their strong desire; their consent that it should proceed to a final determination could not affect the question, or allow partition to be made, and the only thing left to be done would be to dismiss the suit, and make a further attempt for partition. Such are some of the dangers which beset the pathway marked out by my associates—a pathway, I will venture to say, never before trodden by judicial feet.* NORTON, J., concurs with me.

*Since the above was written, a replication has been filed to my dissenting opinion. I care to notice but one point in the reply: In the hypothetical case which I put of a suit for partition brought, and land afterward discovered to be in another county, I asked if the proceedings were to go for nothing. I am told now, that the question of the situation of the land, would be *res judicata*. My understanding has always been that before any question of fact can be thus regarded, the *forum* where it was determined, must have had jurisdiction. Wells *Res Judicata*, §§ 6, 422, 428.

Baldwin v. Whaley.

BALDWIN, *Appellant*, v. WHALEY.

Practice: DECREE: VENDOR'S LIEN. A decree should be in conformity with the pleadings and evidence in the cause.

In a suit to enforce a vendor's lien, fraud on the part of the plaintiff inducing the purchase, was set up in the answer, which prayed the rescission of the contract, the sale of the land and the application of the proceeds to the re-imbursement of defendant for such part of the purchase money and of the taxes as he had paid. The issues of fraud and consequent damages were submitted to a jury who found for defendant, and assessed the damages. The court thereupon entered a decree for the satisfaction of defendant's note for the unpaid purchase money, that plaintiff retain the monies received by him, that defendant retain possession of the land, and that the title to the same be vested in him. *Held*, that such decree should not be permitted to stand.

*Appeal from Platte Circuit Court.—HON. SILAS WOODSON,
Special Judge.*

REVERSED.

Anderson & Carmack and Doniphan & Reed for appellant.

J. E. Merryman and J. F. Merryman for respondents.

HOUGH, C. J.—The plaintiff sued to enforce a vendor's lien for the unpaid purchase money for a certain tract of land sold by him to the defendants, in November, 1866, and for which he had executed to them a bond for title. The defendants, who are husband and wife, set up in their answers that they were induced to purchase said land through false and fraudulent representations of the plaintiff as to the value thereof and by means of undue influence exercised by the plaintiff over them, the defendants, who were at the time of said purchase free persons of color, the defendant, Presley Whaley, having been the slave of the plaintiff until the year 1861. They also set up the amount of purchase money and taxes which had been paid by them under said contract of purchase, and prayed for a rescission

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of the contract; and the defendant Harriet prayed specially that the land purchased should be sold and the proceeds applied to the re-payment of the purchase money paid by her, which she averred was her separate estate. The defendant Harriet also set up a counter-claim for money alleged to have been paid by her under duress. This transaction had no connection whatever with the sale of the land, and it was ignored at the trial.

A jury was called and the following issue of fact was submitted to them: "Was the contract between plaintiff and defendants entered into by the defendants through or by the false, fraudulent and deceitful contrivance and procurement of plaintiff, and if such was the case, what damages were sustained by reason thereof by the defendants?" The verdict of the jury was as follows: "We, the jury, find the issue of fraud in favor of the defendants, and assess the damages in favor of the defendants, and against the plaintiff, at \$1,000." The judgment of the court was that the note in suit be decreed to be satisfied, and that plaintiff retain the money theretofore paid by the defendants and that defendants retain possession of the premises, and that the title thereto be vested in them.

It is manifest that this decree cannot be permitted to stand. The parties and the court seem to have entirely disregarded the pleadings in the cause; under which, and the evidence adduced at the trial, the court should either have enforced the vendor's lien or rescinded the contract of sale, if the defendants were not barred of such relief by acquiescence or the statute of limitations.

The judgment will be reversed and the cause remanded. The other judges concur.

The State ex rel. Haeussler v. Greer.

THE STATE *ex rel.* HAEUSSLER v. GREER, *Appellant*

1. **Retrospective Operation of Statutes and Constitutions:** ELECTION OF CORPORATION DIRECTORS. The intent to give a retrospective operation to a law must be clearly expressed in order that it may receive such a construction; and this is equally as true of constitutional provisions as of statutes. So, where a legislative charter provided that directors of the corporation should be elected by vote of stockholders, allowing one vote for every share, and also provided that the legislature should have no power to alter, suspend or repeal the charter, and subsequently a constitutional provision was adopted providing in general terms for cumulative voting at all elections of corporation directors; *Held*, that as there was nothing in this provision specially applicable to the corporation in question, and as there were other corporations in existence when the constitution was adopted to which it could apply, in addition to those which might thereafter be incorporated, it would be held not to operate upon this particular corporation.
2. **Laws Impairing Obligation of Contracts:** RIGHT TO VOTE AT CORPORATION ELECTIONS. The right of corporators to vote at elections for directors, is a property right, and if the mode of voting is prescribed by an irrepealable charter, is protected by that provision of the constitution of the United States which prohibits the states from passing laws impairing the obligation of contracts, so that the State cannot interfere with it either by constitutional or legislative enactment.
3. **Police Regulations.** A law regulating the mode of voting at corporation elections, cannot be called a police regulation.

Appeal from St. Louis Court of Appeals.—Reported in 9 Mo. App. 219.

REVERSED.

Finkelnburg & Rassieur for appellant.

Broadhead & Haeussler for respondent.

HENRY, J.—This is a proceeding in the nature of a *quo warranto* to determine whether Greer was duly elected a director of the German Savings Institution on the 3rd day of February, 1879, at a regular election for nine directors

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for said corporation. The corporation was chartered by a special act of the legislature, approved February 24th, 1853, the 9th section of which is as follows: "The stock and affairs of the institution hereby established, shall be managed and conducted by nine directors, who shall be elected every second year, at such time and place in the city of St. Louis, as the board of directors for the time being shall appoint, and shall hold their office for two years, and until others be chosen, and no longer, and the election shall be held in such manner as said directors shall by ordinance or by-laws prescribe, and shall be made by ballot, by plurality of the stockholders, allowing one vote for every share; and stockholders not personally present may vote by proxy made in writing directly to the person representing them at such election. In case it should happen at any time that an election of directors should not be made on the day it ought to have been made, the corporation hereby established shall not, for that cause, be deemed to be dissolved, but it shall and may be lawful on any other day to make and hold an election of directors, in such manner as shall be regulated by the by-laws and ordinances of said corporation." By section 10 it was provided that the 7th section of the act of 1845, subjecting every charter thereafter granted by the legislature "to alteration, suspension and repeal in the discretion of the legislature," should not extend to this corporation.

On the 30th day of November, 1875, the present constitution went into effect, and the 6th section of article 12, provided as follows: "In all elections for directors or managers of any incorporated company, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares so held by him or her in said company, multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes

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among two or more candidates; and such directors or managers shall not be elected in any other manner."

At the election in question, the relator, who owned 166 shares of the stock, offered to vote on the cumulative plan, under the constitution, by multiplying the number of his shares of stock by nine, the number of directors to be elected, and casting one-half of those votes (747) for himself as director. Three other stockholders, owning in the aggregate 380 shares of the stock, offered to vote their stock for relator in the same manner, which, added to relator's own votes, would have given him a total vote of 4,261, sufficient to elect him, while under the plan of voting one vote for each share he would have received but 540 votes, if all of his own stock and that of the other three stockholders had been cast for him. Greer received 3,327 votes cast in the manner provided by the charter of the institution, and the canvassers rejecting the votes cast for relator, declared Greer duly elected, and he was admitted as a director.

The following questions are involved: 1st, Was section 6, article 12 of the constitution intended to have a retrospective operation as to the charter of the German Savings Institution and other similar charters? 2nd, If so, had the convention which framed that constitution power under the constitution of the United States, to substitute the cumulative plan of voting the stock in the election of directors of that institution for the plan described by its charter?

A law will not be construed to be retrospective unless by its terms it is clearly intended to be so. "It is not

L. RETROSPECTIVE
OPERATION OF STAT-
UTES AND CONSTI-
TUTIONS: election
of corporation di-
rectors. enough that general terms are employed broad enough to cover past transactions,"

and "statutes are to be construed as prospective only if possible." These general propositions are fully sustained by the authorities cited by Mr. Sedgwick in his work on the construction of statutory and constitutional law, page 161. Our constitution forbids

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the enactment of retrospective laws by the general assembly, and in such disfavor are such laws held and so generally are they condemned, that the intent to give a retrospective operation to a law must be clearly expressed in order that it may receive such a construction.

The language of the constitutional provision under consideration is broad enough to embrace all corporations, but there is no such clear expression of an intent that it should operate upon such corporations as had been previously incorporated with an express exemption from the operation of the general law by which the legislature was authorized to repeal, alter or suspend the charter of every corporation, as makes it necessary to give it that construction.

It was held in the *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, that the charter of a private corporation constitutes a contract between the corporation and the state within the meaning of that clause of the constitution of the United States which declares that no state "shall pass any law impairing the obligation of contracts," and that doctrine has been adopted by this and the courts of most if not all the states of the union. *Sloan v. R. R. Co.*, 61 Mo. 30; *Scotland Co. v. R. R. Co.*, 65 Mo. 135. In the latter case it was contended that section 16 of article 11 of the constitution of 1865 operated to repeal a provision of defendant's charter exempting its property from taxation. That section of the constitution of 1865 reads as follows: "No property, real or personal, shall be exempt from taxation except such as shall be used exclusively for public schools, and such as may belong to the United States, this State, the counties or to municipal corporations in the State." The language of that section was broad enough to embrace the property of the defendant corporation as a subject of taxation, but the court, Judge Napton delivering the opinion, observed: "It is not now maintained by any judicial tribunal that a change in the political form of civil society has the magical effect of dissolving its moral

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obligations or impairing contracts previously vested. Constitutional conventions, which are of frequent occurrence in many of our states, it is believed, have no more power over vested rights than ordinary legislatures. It must be remarked, however, that from well settled rules of construction this 16th section was evidently designed to be prospective and not retrospective in its operation, and it would be an unjust imputation on the convention which framed that constitution, to infer that they designed that section to operate upon existing rights."

The framers of our present constitution were aware of the doctrine announced by the Supreme Court of the United States in the *Dartmouth College case*, and that it had been adopted by the Supreme Court of this State in repeated adjudications, and in the language of Judge Napton, "it would be an unjust imputation on the convention which framed our present constitution, to infer that they designed that section to operate upon existing rights." The section under consideration does not more clearly in its terms embrace the German Savings Institution than did the language of section 16, article 2 of the constitution of 1865 embrace the property of all railroad corporations in the State; and there were other corporations in existence when the constitution of 1875 was adopted to which the 6th section of article 12 could apply, in addition to those which might thereafter be incorporated, so that full effect can be given to it without giving it a construction which would include charters of other corporations expressly exempt from alteration, suspension or repeal by the general assembly.

But conceding that the intention is manifest that it should have the retrospective operation contended for, we think it clear upon all the authorities, that if to be so construed, it is violative of that provision of the federal constitution which declares that: "No state shall pass any law impairing the obligation of contracts."

Speaking of the alleged change made by the constitu-

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tion in the manner of voting the stock of the German Savings Institution, the St. Louis court of appeals says: "Unless it is admitted that the change proposed by the constitutional amendment would injuriously affect the actual value of stock in business corporations it is not easy to see the force of these arguments. If the value of the stock would not be so affected, the argument of the respondent would seem to resolve itself into a mere complaint that stockholders, situated as he is, are deprived of power, of the gratification of exercising control."

The right which one has to control and manage his own property has a value beyond the mere "gratification of exercising control." A man might well hesitate to invest his means in an enterprise of which he had no voice in the management, when he would be willing to risk his capital in it if he had an equal control with others in the management of the business. If a constitutional provision had deprived the stockholders of all right to participate in the election of directors and authorized the governor or other official to appoint them, the argument of the court of appeals would have applied with equal force. In such a case it would make no difference in the right of the stockholders if by the change their interests were infinitely better secured. Their right to participate in the election of directors in the mode prescribed by the charter, cannot be interfered with, either by a constitution or legislative enactment on any such plea as that their interests will be better secured or promoted by the change. The right to manage and dispose of property is a property right, and a property right of substantial value.

In *Hays v. Com.*, 82 Pa. St. 523, speaking of the cumulative mode of voting stock as a substitute for the ordinary mode of voting it, the court said: "Now, whilst it cannot be said that this would not be an alteration in the terms of the charter, it is nevertheless urged that it is a mere regulation of the right of suffrage in corporations but affects the vested right of no one. But if it be not a vested right

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in those who own the major part of the stock of the corporation, to elect if they see proper, every member of the board of directors, I would like to know what a vested right means." That case was similar to this, and we differ from the court of appeals with regard to the force and effect of that decision. We think it directly in point, and a careful examination of the authorities on this subject has satisfied us that to give the section of the constitution of 1875, under consideration, a retrospective operation as to the German Savings Institution, would render it so far void as in conflict with the provision of the constitution of the United States, which prohibits the several states from passing laws impairing the obligation of contracts. The constitutional convention, as we have seen, has no more power to violate vested rights than the legislature, and no general assembly succeeding that which granted this charter, could have interfered with the mode of voting the stock, which, it is contended, the constitution did. This corporation was expressly exempted from the operation of the general law of 1845, which authorized the legislature to alter, suspend or repeal the charter of every corporation thereafter granted by the legislature.

Nor can the section in question, with the construction placed upon it by relator, be upheld as a police regulation.

S. POLICE REGULATIONS. Bentham, in his general view of public offenses, defines the public police as fol-

lows: "Police is in general a system of precaution either for the prevention of crimes or of calamities." Police regulations are such provisions of law as are designed to protect the lives, limbs, health, comfort and quiet of citizens, and to secure them in the enjoyment of their property, and the police power can be invoked for an interference with one's dominion over his own property to prevent such use of it by him, or its continuance in such conditions as would be detrimental to the community, and on no other grounds. *Thorpe v. Rutland R. R. Co.*, 27 Vt. 140. "It is *prima facie* competent to any man to enjoy and deal with his own prop-

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erty as he chooses. He must, however, so enjoy and use it as not to affect injuriously the rights of his fellow subjects." Broom's Legal Maxims, 394. In *Sloan v. Pacific R. R. Co.*, 61 Mo. 24, Judge Napton, speaking for the court, said: "This term, police, is a very indefinite one. Perhaps Judge Cooley's definition may be considered as exact a one as we shall find. 'Police regulations,' says the author, 'must have some reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges, which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter, or curtailment of the corporate franchise.'"

The respondent had a judgment in the circuit court, which, on appeal to the St. Louis court of appeals, was reversed and remanded, and our judgment is, that that of the court of appeals be reversed. All concur.

**FLYNN v. THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS
RAILROAD COMPANY, Appellant.**

1. **Action by Legal Representative for Death: MEASURE OF DAMAGES.** The measure of damages in an action brought by the legal representative of an employe of a railroad company against the company for his death, is not the fixed sum of \$5,000, but a sum not exceeding \$5,000. The right of action is given by section 3 and not section 2 of the Damage Act.
2. **Master and Servant: WHAT RISKS SERVANT ASSUMES: NEGLIGENCE OF MASTER.** A servant, by continuing in the business of his master after he becomes aware of defects in appliances furnished him by his master, does not necessarily assume the risk of all injuries which may result from such defects. If the defects grow out of the want of ordinary care and vigilance on the part of the master in providing or maintaining the appliances, and are not so serious but that with

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care and prudence on the part of the servant they may be safely used, and at the request of the master he continues to use, and in using them exercises care and prudence, if injury result to him notwithstanding, he may hold the master liable.

3. —— : MASTER'S NEGLIGENCE. The liability of a railroad company for an injury sustained by an engineer through a defect in the track existing through the negligence of the company, will not be discharged upon proof that the air brake on the engine was out of order, that the engineer knew this, and that if it had been in order the accident might have been averted.
4. Presumption of Care. The law, out of regard to the instinct of self-preservation, presumes that a person who has suffered death by a railroad accident, was at the time of the accident in the exercise of due care, and this presumption is not overthrown by the mere fact of the injury.

*Appeal from Buchanan Circuit Court.—Hon. Jos. P. GRUBB,
Judge.*

REVERSED.

W. P. Hall and Strong & Mosman for appellant.

Woodson & Crosby and Pike & Pike for respondent.

PHILIPS, C.—John Flynn was an engineer on defendant's road, running a passenger train to and fro between St. Joseph and Council Bluffs. He was killed by the upsetting of his engine on defendant's road on the 23rd day of August, 1875. The plaintiff is his widow and sues for \$5,000 damages. The grounds of negligence alleged in the petition are the bad and defective condition of defendant's railroad track at the point of disaster; the defective condition of the flanges of the wheels of the engine; the defective and unsafe condition of the air brakes and defendant's failure on notice to repair them, and its neglect and failure to provide the train with sufficient brakemen in the absence of the air brake. The answer tendered the general issue, and pleaded contributory negligence on the engineer's part.

The evidence showed that Flynn was a competent and experienced engineer, and made three trips a week over this

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road. The engine in question was not the one he used on said road. His regular engine was out of repair. He examined the engine assigned him and deemed it in order. On the 22nd day of August he ran it from St. Joseph to Council Bluffs. On the way the air brakes got out of order. He notified the conductor and required the brakeman to employ the brakes the balance of the way. On reaching Council Bluffs he informed the assistant master mechanic of the trouble, but it seems the defect in the air brake could not be repaired there, nor could the repair be made short of St. Joseph. Flynn's assigned duty required him to take this engine and train back to St. Joseph on the 23rd. He informed the conductor of the situation of the air brake and requested that the train be broke by the men. The evidence shows that for such train two brakemen were ordinarily sufficient, and that it was customary for the baggageman to perform the duty of brakeman when necessary. On this train there was but one regular brakeman, and the baggageman did not appear to have performed this duty on this trip. On the way back to St. Joseph, while the train was running at "a usual rate of speed, about twenty miles an hour," the wheels of the engine jumped the rails and after running about 500 or 600 feet, went off, killing Flynn. The evidence tended to show that at this point the track was in bad condition, and that the engine was derailed in consequence of a low joint and that this low joint had existed for several days, and was perhaps known to some of the trackmen. There was no evidence that deceased was apprised of its existence, but there was evidence from which it might reasonably be inferred that he had notice of the generally bad condition of portions of the road. The evidence showed that with the air brake, the train might have been checked up before the engine upset, and with the ordinary brakemen it would require probably 400 or 500 feet to check it at the rate it was going. The evidence also showed that J. F. Barnard, general superintendent of defendant, issued on the 22nd day of July, 1876, an order to

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W. D. Rowley, master mechanic of defendant, as follows : "Notify engineers not to run faster than card time between Wing Lake and Corning, and between Phelps and Nishnabotna, and to modify their speed as much as necessary for safety until the track can be got into better condition." This notice was served upon Flynn a short time before the accident, and Flynn indorsed his name on it as evidence of service. The evidence also showed that the point where the engine and train left the track, and where Flynn was killed, was within the limits described in the notice.

For the plaintiff the court gave the following instructions:

1. If the jury find from the evidence that the road bed or track of defendant, at the point where the engine in charge of said John Flynn was thrown off the track, was defective or unsafe, or that the said engine at the time of the accident was defective or unsafe, and that defendant knew thereof, or might have known thereof by the exercise of reasonable care and diligence, and that the said engine so in charge of the said Flynn as engineer was so thrown off the said track in consequence of said defective condition of said track or of the said engine, after such defective condition of said track or said engine was known or ought to have been known by defendant, and that said Flynn received injuries in consequence of said engine being thrown off the track as the result of said defective condition of said railroad track or engine, of which said Flynn died, and that said Flynn was exercising ordinary care and prudence at the time he received said injuries, and was guilty of no negligence directly contributing thereto, and if they further find from the evidence that plaintiff was the wife of said Flynn at the time of his death, then the jury will find for the plaintiff in the sum of \$5,000.

2. Although the jury may find from the evidence that the track of defendant, at the point where the engine was thrown off, was unsafe or dangerous, or that the engine was defective or unsafe, or that the same was known to the

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deceased; yet if the defective or dangerous condition of said track or engine was not of sufficient character that they could not be reasonably used by the exercise of skill and diligence, then the said Flynn, in using said track or engine as such employe of defendant, did not assume the use of said track or engine at his peril, and was only required to take and was responsible for the care incident to the situation in which he was placed in the use of said track or engine, and whether he exercised such care in the use of said track or engine at the time of the accident, is a fact for the determination of the jury.

The court then gave for defendant the following instructions:

3. If the jury believe from the evidence that the death of John Flynn was caused by the negligence or want of care on the part of the brakemen on the train in proof, the jury will find for defendant.

4. If the jury believe from the evidence that the notice in proof purporting to be signed by J. F. Barnard, as superintendent of defendant, was so signed, and that said Barnard was superintendent aforesaid at the time of signing the same, and that deceased knew of said notice before the accident in proof, and said notice was in force at the time of the accident, and said accident occurred between Nishnabotna and Phelps by reason of a defect in defendant's track between said points, and by reason of his failure to modify the speed of the train, then the jury will find for defendant.

7. If the jury believe from the evidence that after said air-brake ceased to work, deceased informed the conductor of the train in proof at Council Bluffs that said brake would not work, and that said conductor must tell the brakemen of the train and the baggage master that they would have to break the train by hand to St. Joseph, and did not ask for additional brakemen, and that said conductor did accordingly direct said brakeman and baggage master to break said train to St. Joseph by hand, then defendant is not re-

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sponsible for not employing additional brakemen, and if said accident was occasioned by the want of additional brakemen, they will find for defendant.

9. If the jury believe from the evidence that the negligence or carelessness of deceased directly contributed, either in part or in whole, to his death, they will find for defendant.

10. If the jury believe from the evidence that at the time of the accident the engine or train of defendant was in such condition that with reasonable care it could be used with safety, then for any injury caused by any defect in such engine defendant is not liable, and as to such injury they will find for defendant.

11. If the jury believe from the evidence that at the time of the accident the engine or train of defendant were in such condition that they could not with reasonable care be used with safety, and such unsafe condition was known to deceased, they must find for defendant as to any injury caused by the unsafe condition of such engine or train.

12. If the jury believe from the evidence that the track of defendant at the time and place of the accident was not in such condition as to be used with safety with reasonable care, and that deceased had notice of such condition, then plaintiff cannot recover for any injuries caused by such defect in the road.

13. If the jury believe from the evidence that the road of defendant at the time and place of the accident was in such condition that with reasonable care it could have been passed over by the train with safety, they will find for defendant for any injury caused by a defect in such road.

The court on its own motion gave the following instruction:

If the jury believe from the evidence that the air-brake in proof ceased to work after the train in proof left St. Joseph, and that it was in the same condition when said train left Council Bluffs, and the condition of said air-brake rendered the running of said engine and train dangerous to

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the safety of said Flynn, of which fact of the defective condition of said brake and the danger to him from running said train without the use of said air brake, said Flynn was well acquainted, then said Flynn in starting on such trip, knowing said air brake to be in said condition, took upon himself the risk of all accidents which might occur by reason of said defective air-brake.

To the giving of said last mentioned instruction the defendant objected and excepted.

The defendant asked a number of other instructions, some of which are immaterial to be passed on, and such as are material will be considered in the proper connection.

This cause must be reversed. The circuit court erred in instructing the jury, if they found for plaintiff, to assess

1. ACTION BY LEGAL
RE PRESENTATIVE
FOR DEATH: meas-
ure of damages. the damages at \$5,000. This being an action by the legal representative of an employee of the railroad company, it accrued under section 3 of the Damage Act, and not section 2. In such case the measure of damages is "not exceeding \$5,000." It may be less. Wag. Stat., § 4, p. 53; *Holmes v. Hannibal & St. Joseph R. R. Co.*, 69 Mo. 585.

As the case must be remanded for re-trial, it is necessary to determine, for the guidance of the trial court, some questions raised on other instructions given and refused on the first trial.

The defendant complains most of the second instruction given for plaintiff, which declared that although Flynn knew of the alleged defect, "yet if the defective or dangerous condition of said track or engine was not of sufficient character that they could not be reasonably used by the exercise of skill and diligence he did not assume the use of said track or engine at his peril, and was only required to take and was responsible for the care incident to the situation in which he was placed in the use of such track or engine, and whether he exercised such care in the use of said track or engine at the time of the accident, is a fact for the determination of the jury." Defendant's counsel insists, for the

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rule as applicable to every state of facts, that the employe takes upon himself the risks incident to the character of his employment, and that when he has notice of the existence of defective machinery or implements or appliances connected with his employment, he cannot recover for injuries resulting therefrom.

The general doctrine between master and servant is now pretty well settled. A person entering the service of another takes upon himself, in consideration of the promised compensation, the natural ordinary risks of his employment, the perils incident to the performance of his work, including the negligence of his fellow-servants. And the master on his part is bound to use ordinary care and vigilance in providing suitable structures, engines, road-tracks and proper servants. *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, 255; *s. c.*, 14 Am. Rep. 598; *Snow v. Housatonic R. R. Co.*, 8 Allen 441; *Flike v. Boston, etc., R. R. Co.*, 53 N. Y. 549; *s. c.*, 13 Am. Rep. 545; *Smith v. St. Louis, Kansas City & Northern Ry Co.*, 69 Mo. 32. The master does not become the absolute insurer of the safety of his servant; nor is he bound under all circumstances to provide for him the most approved or best improved machinery and equipments, or such as are absolutely safe. His care in this respect is ordinary precaution. What is ordinary care cannot be determined abstractly. It is necessarily a relative term. It must be measured by the nature of the work to be done, the instruments to be used, the hazard and peril of the situation. The law by "ordinary care" means simply the caution and vigilance which reasonable and prudent men exercise under like circumstances. *Cayzer v. Taylor*, 10 Gray 274, 280; 2 Thompson on Neg., 982, 983; *Ford v. Fitchburg R. R. Co.*, *supra*, 256.

While the servant, by the terms of his undertaking, assumes the risks and dangers of his employment, it must be observed that these are the usual and ordinary risks incident to the particular work in which he is engaged. It does not embrace in every instance casualties and injuries

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resulting from neglect of the corresponding duty of the master. "This requires him (the master) to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of the servant, and renders him liable for damages occasioned by a neglect or omission to fulfill his obligation, whether it arises from his own want of care, or that of his agents to whom he entrusts the duty." *Snow v. Housatonic R. R. Co.*, 8 Allen 447. This doctrine springs from the fact that the negligence or malfeasance of the master enhances the risk to which the servant was exposed beyond that which was natural to the risk he assumed. *Wedgwood v. C. & N. R'y Co.*, 41 Wis. 478. This duty of the master is not discharged by simply providing or having made at the outset suitable and reasonably safe machinery and instruments, but he must maintain them by keeping them in repair or exercising reasonable care and watchfulness to guard against their being out of order and unsafe. *Ford v. Fitchburg R. R. Co., supra*, 261; *Wedgwood v. C. & N. R'y Co., supra*.

It is equally well settled as a general rule that where the servant, having notice of the existence of defective machinery or bad road-bed or track or of incompetent and reckless fellow servants, voluntarily enters upon duty with such instruments and co-laborers, he assumes the risk and cannot recover for any injury resulting therefrom. But this rule, if it would be inaccurate to say has its exceptions, yet its application is more or less controlled and varied by the special facts and circumstances of the case. In other words, the law is and ought to be a rational science, furnishing a system of practical rules, working always in harmony but possessing such flexibility as to secure in each particular case as exact justice as is possible. So, if a servant takes employment on a railroad, knowing that his fellow-servants are unskillful and careless, he could not, in case of injury resulting therefrom, insist on a right of recovery based on the rule of the duty of the company to select prudent and discreet servants. So, if he knows that

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an engine is out of order, or there is a particular defect in a given part of the road-bed or track, yet without more he accepts service on such engine and road, and is thereby injured, he cannot in an action for damages invoke the rule that imposes on the company the obligation to furnish a reasonably safe engine or track. Nevertheless, there are circumstances under which a person, being in the employ of a railroad, having notice of defects in equipments and machinery, may recover for an injury resulting therefrom, as where, on discovering the defect, he is assured by the superior that it is not dangerous or that it will be timely repaired, whereupon in reliance thereon he remains, being himself careful and vigilant, he may recover for the injury resulting from such unrepairs defect. *Holmes v. Clarke*, 6 Hurl. & N. 349; *Clarke v. Holmes*, 7 Hurl. & N. 937; *Patterson v. Pittsburg & C. R. R. Co.*, 76 Pa. St. 393; *s. c.*, 18 Am. Rep. 412; *Ladd v. New Bedford R. R. Co.*, 19 Mass. 412; *s. c.*, 20 Am. Rep. 331, and authorities; *Stoddard v. St. Louis, Kansas City & Northern R'y Co.*, 65 Mo. 520; *Keegan v. Kavanaugh*, 62 Mo. 232.

Again, take the case now under review. It appears from the evidence that the engine furnished deceased to make the trip with had not been used theretofore by him. It was the duty of the company to furnish him one reasonably safe and in good working order. He looked over it before starting out, and it was apparently efficient. On the way the air-brake proved defective and useless. Suppose the engineer did not consider his train so easily managed without it, would the law, or court, or common sense justify him, *en route*, in abandoning his assigned post of duty and leaving his engine and the train of passengers on the track, at the peril of losing his position, when, with the assistance of brakemen and ordinary care he had every reason to believe he could safely go through? He would be esteemed by all railroad men as recreant to his high trust and wanting in that staid judgment and nerve which is the basis of a character suited to the responsible office of an engineer.

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On his arrival at Council Bluffs it appears he did, in compliance with the regulations of the company, report the trouble to the assistant master mechanic. It then became the duty of the company to repair the air-brake or provide another engine. But this could not be done there, or at least was not done. The only office performed by the air brake is to stop the train more easily and suddenly than by the old method of brakemen. It in nowise affected the working or security of the engine. In case of derailment it might enhance the chances of safety by enabling the engineer to arrest more immediately the train than with brakemen. Could it be said, under such circumstances, that the engineer, by continuing at his post, took all the risk of returning with his train to St. Joseph? There was no imminent danger, nor could it be said any danger was obvious. He had the day before come over the track on time with safety, with the air-brake disabled. To have declined to serve his employer under such circumstances would have been inexcusable and justly merited dismissal.

The observation of Napton, J., in *Keegan v. Kavanaugh*, 62 Mo. 232, is quite appropriate: "The primary duty of the servant is obedience, and it is not to be expected that he will, upon mere imaginary danger, of which he may be conscious, assert his right to relinquish his employment. He naturally looks to his employer for the observance of all reasonable and proper precautions, and his continuance in the service, when such precautions have not been observed, is rather to be attributed to confidence reposed in those to whose superior judgment he yields. If the risk is such as to be perfectly obvious to the sense of any man whether servant or master, then the servant assumes the risk. But if it is a case where no such obvious risks are incurred, and where it was fair to presume that the employer had been guilty of no negligence, the rule in law as well as common sense and justice is, that the master is responsible for damages, if any ensue." In *Patterson v. Pittsburg & C. R. R. Co., supra*, 393, this same doctrine is

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announced. Referring to *Clarke v. Holmes*, 7 Hurl. & N. 937, and *Snow v. Railroad Co.*, 8 Allen 441, the court says; "In both these cases the defects from which the accidents arose were known to the employes, but as they were injured in the discharge of duties imposed upon them by their employers, such knowledge was adjudged not to raise a presumption of concurrent negligence. This doctrine is obviously just and proper. The servant does not stand on the same footing with the master. His primary duty is obedience, and if when in the discharge of that duty he is damaged through the neglect of his master, it is but meet that he should be recompensed. The general principle as recognized by our own cases, *inter alia*, *Caldwell v. Brown*, 3 P. F. Smith 453, and *Frazier v. Pennsylvania R. R. Co.*, 2 Wright 104, is, that the employer is bound to furnish and maintain suitable instrumentalities for the work or duty which he requires of his employes, and failing in this he is liable for any damages flowing from such neglect of duty." This language is employed with approbation by this court in *Conroy v. Vulcan Iron Works*, 62 Mo. 35.

Speaking for myself, I do not approve of the language "threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill." This language involves a new rule liable to great misconstruction. It makes the liability of the master dependant on the certainty or uncertainty of injury. Under it, as to those injuries certainly to follow, the servant assumes the risk, and as to those which are uncertain the servant assumes none, the master all, of the responsibility. The term "immediate injury" implies that in such case the servant takes the risk, but when the danger is such that injury cannot or may not occur till some far-distant time, the servant assumes no risk at all. The opinion of the judges in *Clarke v. Holmes*, *supra*, expresses more correctly the true idea: "There is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery and that of one who on a

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temporary defect arising is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied. In the latter case the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfill his obligation. No doubt a defect thus arising in machinery may be such that no man of ordinary prudence would run the hazard of working on it. If a jury should find that a party complaining had materially contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that a plaintiff, who has materially contributed to his own injury by his own negligence, cannot recover although he may show negligence in the opposite party. But the question whether the injury of which the plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff has had any share in bringing it about, is one wholly for the jury." Crompton, J., page 946, says: "We need not consider the personal knowledge, in such a case, the plaintiff had of the danger, because there was a neglect of duty on the part of the defendant in not keeping the machinery fenced. The party cannot recover if he has contributed to the accident, * * * knowledge is only a part of negligence."

Applying the law thus ascertained to the facts of this case so far as the air-brake is concerned, it must be borne in mind that it could have had no possible agency in derailing the engine, in the first place. Its disability could only have prevented the earlier arresting of the motion of the engine and possibly prevented its upsetting. Whether it would or not, was a question for the jury. Flynn's knowledge of its condition would not prevent his recovery, provided he ran the engine under circumstances of prudence and care free from negligence on his part contributing directly to the injury. On the other hand, if the company had exercised due care and inspection in furnishing a rea-

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sonably safe engine, and the same suddenly, while *en route*, became disabled and after notice it failed and neglected to repair the defect, when in its power to do so, it would, under circumstances of due care on the part of the engineer, have been answerable for the injury, if any, resulting therefrom. Or if, after such notice, it was unable to make the needed repair at Council Bluffs, or to furnish another engine, but started the engineer back with the defective one, it was its duty to have provided the usually necessary brakemen to run the train over the road to render it safe so far as such a mode of breaking was safe, and if it failed of its duty in this respect, and injury resulted therefrom to the engineer exercising due care, the company was liable. Of these facts, under proper instructions, the jury are the judges.

As to the condition of the track of the railroad, it was the duty of the defendant to have maintained it in a reasonably safe condition for its employes. The engineer had nothing to do with its inspection and repair. That belonged to other employes of the defendant, between whom and the engineer the relation of fellow-servants did not exist, so as to exempt the defendant from liability to the engineer for any neglect of duty of the trackmen. On this all the recognized authorities are agreed. The defendant is chargeable for neglect to repair its track when it has notice of the defect or might with the exercise of due care and inspection have discovered the existence of the defect. Notice of this fact to the employes of the company entrusted with the inspection and repair would be notice to the company. Whether the defect alleged in the petition existed, and whether it caused the injury in question, and whether defendant had notice thereof, or might have known of it in the exercise of proper diligence, are questions of fact for the determination of the jury.

The defendant insists that the order issued by the general superintendent was equivalent to notice to the engineer that the road was unsafe, and, therefore, if he continued to

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run over it he assumed the risk. The order was a command to the engineers, "not to run faster than card time between Wing Lake and Corning and between Phelps and Nishnabotna, and to modify the speed as much as necessary for safety until the track can be got into better condition." There is nothing in the proof to indicate that the engineer was running faster than card time, or that the speed was necessarily hazardous. As these were matters entrusted to the engineer, it was a question of fact for the jury to determine whether he was running in violation of the regulation. If he was and the injury was attributable to his disobedience, he cannot recover. This order did in effect convey information that in the opinion of the superintendent the track was not in good condition. But it is evident that its condition was not such as, in his opinion, to render it unsafe to run a train over it within "card time" and modification of the speed according to the circumstances. It also conveyed the assurance that the track was to "be got into better condition." The evidence showed that this work of reparation was in progress at the time of the accident. Conceding that the engineer had notice of the general bad condition of the road, this notice from the superintendent, his superior officer, was in effect a declaration that the road was not necessarily hazardous, and the engineer could continue to run over it, exercising care, and that the superintendent would remedy the defect. The engineer had a right to rely on the supposed superior judgment of the superintendent and to continue to run under the assurance of remedying the defect. Authorities cited, *supra*.

In addition to this, the engineer had been running over this road nearly every day, had passed over it the day before. It cannot be said he was guilty of contributory negligence in running over it when hurt. *Ford v. Fitchburg R. R. Co.*, 110 Mass., *supra*; *Lewis v. St. Louis & I. M. R. R. Co.*, 59 Mo. 495; *Snow v. Housatonic R. R. Co.*, 8 Allen 450. In *Patterson v. P. & C. R. R. Co.*, *supra*, 394, the court says: "Let it be conceded that the switch in ques-

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tion was dangerous, yet doubtless many trains had passed over it safely, and hence a man of common prudence might well conclude that though it was more than ordinarily dangerous, yet many more trains might in like manner be passed over it in safety. Under such a state of facts the conductor might properly rest upon the judgment of his superiors who requested him to continue its use hoping that by extra care and skill he might avert accidents until the switch was reconstructed or properly repaired."

Hawley v. N. C. Ry Co., 82 N. Y. 370, is most pertinent. The engineer knew that the road was somewhat out of repairs, yet it did not appear that he knew of the particular defect, or that the danger was very great. He was running, under orders, an engine ahead of a passenger train, and was injured by his engine overturning, caused by the bad condition of the road. The court says: "While the plaintiff knew that the road was somewhat out of repair, and that he incurred some danger in running his engine, it does not appear conclusively that he knew how badly it was out of repair, or that the danger was imminent or very great. Three or four passenger trains, besides freight trains, passed over the road daily, each way, and it does not appear that any other accident had happened from the bad condition of the road. The plaintiff and other engineers had frequently run their engines over the road in the same way in which the plaintiff ran his on the occasion of the accident, and had done so with safety. The plaintiff was ordered by competent authority to run his engine just as he did and he had received assurance that the road would soon be put in repair. We must take into account plaintiff's position. His business was that of an engineer, and unless he obeyed orders and ran his engine he would have been obliged to abandon defendant's service. Of one thus situated the law should not be too exacting. We must assume that the officers of the defendant who had charge of the road and must have known its condition, deemed it safe, and the plaintiff had the right to rely somewhat upon

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their judgment. Other employes of the road and hundreds of passengers were daily trusting their lives upon the road, and on the day of the accident he was ordered and did precede a passenger train. Under such circumstances, was the plaintiff bound to set up his judgment against that of all others and determine for himself that the road was absolutely unsafe for the passage of his engine, and abandon his position as engineer, or take upon himself the risk caused by defendant's negligence? We think, under all the circumstances, and upon all the evidence given on both sides, that it was a question for the jury to determine whether the plaintiff acted with reasonable prudence and discretion in venturing to run his engine over the road." See also *Dorsey v. P. & C. Construction Co.*, 42 Wis. 583, and *Cummins v. Collins*, 61 Mo. 524.

Instruction number two, given on behalf of plaintiff, while not subject to the unqualified objections made by the learned counsel, was as an abstract proposition, too comprehensive, and as a rule of law it could not be of universal application. The instruction ought to predicate as a basis for its application the necessary facts to be found by the jury, and if the jury find them to exist, then they may be instructed that Flynn's knowledge that the air-brake was disabled and that the track was not in good condition, would not prevent plaintiff's recovery under the existence of such facts, provided Flynn was not, at the time and place of the injury, running his train in violation of the directions of the superintendent, and was otherwise exercising due care; of all which the jury are to determine from all the facts and circumstances in evidence.

In view of the law arising on the facts of this case, the second, fifth, sixth and eighth instructions, asked by defendant, were properly refused, especially in view of other instructions conceded to the defendant.

The eighth instruction refused was calculated to confound. It submitted a question almost impossible of solution. If the bad condition of the track, the low joint,

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caused the derailment of the engine, that was the *causa causans* of the injury, and if it existed through the fault of defendant, the possibility that the engine might have been checked before it overturned had the air-brake worked, would not have discharged the defendant from liability. It is not the case of two or more concurring and independent causes, producing an injury, where the plaintiff himself is the author of one of the causes.

The fourth instruction given for defendant ought not to be conceded again unless the proof is different, tending at least to show that Flynn, having knowledge of the defect at the point of the accident, failed to "modify the speed of the train." The law, out of regard to the instinct of self-preservation, presumes that the deceased at the time was in the exercise of due care, "and this presumption is not overthrown by the mere fact of injury." The burden rests upon the defendant to rebut this presumption. *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 229, 233.

The judgment of the circuit court is reversed and the cause remanded for re-trial in conformity with this opinion. MARTIN, C., concurs; WINSLOW, C. absent.

For the reasons given in the foregoing opinion, Judges HOUGH, NORTON, RAY and SHERWOOD were of opinion that the judgment of the circuit court should be reversed and the cause remanded. Judge HENRY concurred in the conclusion reached.

FARISH, Plaintiff in Error, v. COOK.

1. **Statute of Limitations: CUMULATION OF DISABILITIES.** The period of coverture cannot be added to that of minority of the same person in order to prevent the running of the statute of limitations.
2. **A Will Construed: "ALL MY WORLDLY GOODS."** A will ran thus: "I give and bequeath to my beloved wife all my worldly goods,

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consisting of household furniture, clothing, beds and bedding, money and cattle, also whatever debts may be due me, likewise my house and lot, * * to be by her enjoyed during her life, and at her death to belong to the child with which she is now pregnant, if it should survive her, if not, then the said house and lot to be vested absolutely in her." In addition to the house and lot, the testator, both at the time of making the will and at his death, owned other real estate. *Held*, that it could not pass by the designation "all my worldly goods," and as it was not specifically mentioned or otherwise referred to, as to it the testator died intestate.

3. **Wills: PRESUMPTION AGAINST INTESTACY.** It is a natural presumption that a testator, in making his will, intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption ought to have weight, but it cannot supply the actual intent of the testator to be derived from the language of the will. When the clause to be construed cannot be connected with some other part of the will disclosing such intent, it cannot prevail, nor even where the intent is disclosed, in the absence of language sufficient to carry everything.

Error to St. Louis Court of Appeals.—Reported in 6 Mo. App. 328.

AFFIRMED.

Henry W. Williams and E. T. Farish for plaintiff in error.

Krum & Krum and Glover & Shepley for defendant in error.

MARTIN, C.—This was an action of ejectment, commenced on the 26th day of February, 1875, in the circuit court of the city of St. Louis, to recover possession of a tract of land in the Grand Prairie Common Fields, two arpens in width by forty in depth. The defendant denied the plaintiff's right of possession, and pleaded the defense of the statute of limitations, relying upon an actual, uninterrupted and exclusive adverse possession for more than forty years before commencement of the suit. The case was tried by the court, and a great deal of evidence peculiar to this class of cases, was submitted by both sides. The

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merits of the case seem to have been disposed of in certain rulings on the evidence, as the case proceeded. At the conclusion of the evidence, the defendant asked and the court gave the following instruction:

If the court finds from the evidence that the defendant took actual possession of the land in controversy in this suit as early as the year 1848, and that he has had actual, continuous and uninterrupted possession of the same ever since, and down to the commencement of this suit, under claim and color of title adverse to the plaintiff, and those under whom he claims, then the plaintiff cannot recover in this action.

After this action of the court the issues were found for the defendant, and judgment rendered in his favor. The plaintiff appealed to the St. Louis court of appeals, and the judgment was affirmed. 6 Mo. App. 328.

The evidence in the record tended very strongly to prove that the defendant, and those under whom he claimed title, had been in the uninterrupted and peaceful possession of the land under color of title from 1845, a period of thirty years. This ought to be a good defense against any title, unless some of those disabilities indicated in the statute, such as minority and coverture, have occurred to arrest the effect of its beneficent provisions. The plaintiff claims that the owners of the title asserted in this case were under the disability of coverture a sufficient length of time to deprive defendant of his full bar of the statute which he otherwise would have. It becomes necessary to examine this important and decisive question, which seems to have disposed of the case in both of the lower courts. If the defendant is right in this defense, nothing can be gained by considering the difficult questions relating to the location of the Spanish grants given in evidence, which have been discussed with so much learning and ability by the counsel for both sides.

The plaintiff's chain of title commenced December 30, 1766, with a Spanish concession of that date, of two arpens front by forty in depth, in the Grand Prairie, to

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John Baptiste Hervieux. This original grantee died on the 6th day of November, 1775, and on the 7th day of January, 1776, at the judicial sale of Hervieux's estate, under an order of the lieutenant-governor of Illinois, Louis Honore became the purchaser of this concession. Louis Honore died on the 26th day of April, 1807, leaving as his sole heir Louis Tesson Honore, his son. On the 2nd day of February, 1816, Recorder Bates, under the provisions of the acts of congress of June 13th, 1812, and March 3rd, 1813, reported this concession to congress for confirmation, and it was confirmed in pursuance of the act of congress of April 29th, 1816, to John Bte. Hervieux's legal representatives. This confirmation enured to Louis Tesson Honore, owner of the title at that time. Louis Tesson Honore died on the 21st day of August, 1827, leaving a widow, by name Amaranthe, and a child named Maria, who was born August 14th, 1827, seven days before his death. He also left a will which he had made on the 7th day of August, 1827, two weeks before his death; which was admitted to probate on the 1st day of October, 1827, in which, it is claimed by plaintiff, he intended his widow should be his devisee as to this land. His widow married Louis Leduc on the 30th day of January, 1832, and died November 24th, 1864, under the coverture of this marriage. His daughter Maria married William Booth on the 26th day of April, 1848, and during the coverture of this marriage deeded the land to the plaintiff on the 3rd day of August, 1874, in consideration of the sum of \$5.

It is obvious from this statement relating to the title that it became an important matter to the plaintiff, in meeting the defense of the statute of limitations, as to which one of the two methods of devolution afforded him the best right of action in 1875, when he filed his petition. If he derived his title from Mrs. Booth, as the only child and heir of Louis Tesson Honore, then the title descended to her subject to her mother's dower at the date of her father's death, August

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21st, 1827. Her minority would arrest the running of the statute of limitation until the 14th day of August, 1848, at which time she attained her majority. But her coverture, which commenced April 26th, 1848, a few months only before the expiration of her minority, and continued till she made her deed to plaintiff in 1874, could not be added to her disability of minority for the purpose of continuing her exemption from the bar of the statute; provided the adverse possession of the defendant commenced under her first disability of minority. Now, it is in evidence, as heretofore stated, that the adverse holding of defendant and his grantors did commence in 1845, which was about three years prior to her majority. The deduction of three years on account of her minority would leave an adverse holding of twenty-seven years, upon which judgment would have to go for defendant.

If the plaintiff could successfully derive title from Mrs. Booth, as inheriting it from her mother as the devisee of the father, then the defense of the statute would be overcome, because she would not have inherited it till the death of her mother on the 24th day of November, 1864, and the coverture of her mother with Louis Leduc from January 31st, 1832, would arrest the operation of the statute as against the adverse possession of defendant commencing in 1845, and pass the title to Mrs. Booth on the 24th day of November, 1864, unimpaired by its effects. The coverture of Mrs. Booth existing at that date, and continuing till her conveyance to plaintiff in 1874, would arrest the operation of the statute till that date, and leave the defendant with an adverse possession within the statute, of about one year instead of twenty-seven. The coverture of the mother and the succeeding coverture of the daughter would not constitute a cumulation of disabilities, because they appertain to different parties.

It is proper for me to remark here, that I am stating the position which the plaintiff takes in order to meet the defense of the statute of limitations, and that I have no

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occasion to consider whether the bar of twenty-four years in the act of 1847, is affected by **coverture** or **minority**. *Valle v. Obenhouse*, 62 Mo. 81.

The controversy is thus narrowed down to the single question as to whether Louis Tesson Honore devised this land to Amaranthe, his widow, or died as "all my worldly goods." to it intestate, thus casting the descent at once upon his daughter, who afterward married William Booth, and conveyed it to the plaintiff. The determination of this question depends upon the construction of the will of Honore. The only clause by which anything was devised in the will is as follows: "Secondly, I give and bequeath to my beloved wife, Amaranthe Honore, all my worldly goods, consisting of household furniture, clothing, beds and bedding, money and cattle; also whatever debts may be due me; likewise my house and lot I now occupy in the city of St. Louis, to be by her enjoyed during her life, and at her death to belong to the child with which she is pregnant, if it should survive her, if not, then said house and lot to be vested absolutely in my said wife, to be by her disposed of as she may think proper." This is an authentic translation of the will which was written in French. If this land was devised by the will, then it must have been included in the words "all my worldly goods."

While it is true that the intention of the testator must govern the construction of his will, it is equally true that this intention must be obtained from the words of the instrument as applied to the subject matter and the surrounding circumstances. The intention must come from what he says in his will. If this is apparent from the words as applied to the subject matter it should be accepted and followed by the courts, unless it contravenes the law or leads to absurd conclusions. When such results are threatened, the action of the court is governed by rules which need not be considered in this case. Did the testator, by using the term "all my worldly goods," intend to devise this land to his wife?

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One of the rules of construction adopted by Jarman, and accepted in England and America, is, "that words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another, can be collected, and that other can be ascertained, and they are in all cases to receive a construction which will give to every word some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction, that is to be preferred which will prevent a total intestacy." 2 Jarman on Wills, 762. The wisdom of this rule is more strongly recognized the more it is applied. In the case of *Grey v. Pearson*, 6 H. L. C. 61, Lord Wensleydale remarks: "I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted, at least in the courts of law in Westminster Hall, that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further." In *Young v. Robertson*, 4 Macq. H. L. C. 314, (2 Scotch App., Paterson 1108,) the court says: "The primary duty of a court of construction in the interpretation of wills, is to give to each word employed, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life, and not to give to words employed in that vocabulary an artificial, a secondary and a technical meaning." Judge Strong, in *Christie v. Phife*, 19 N. Y. 344, decided in 1859, says: "The language used shall receive its ordinary interpretation, except where some other is necessary or clearly indicated." In determining what is the natural and ordinary sense of the words used in a will, adjudicated cases can render no valuable assistance. They are too apt to mislead or bias the mind.

According to its natural grammatical and ordinary

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meaning, the word "goods" does not include lands. It includes only personal property. General usage has given it this meaning. This is its primary signification. If it possesses any other meaning in this will it must appear from the context. Of course, if the testator had declared in his will that by the use of the term "goods" he intended to include real estate, that intent so declared in the will, would control the ordinary meaning of the word. So, if in the absence of any express declaration, it appears from the context of the will, that he intended to use the word in a different and more comprehensive meaning, so as to embrace real estate, the courts would give effect to that intent. But I am unable to discover anything in the context of this will to indicate that the word was used with such a meaning. In prefixing it with the words "all my worldly," he makes use of a phrase, which if used alone with the word "goods," might be reasonably supposed to embrace his lands; and this meaning of the phrase has in some instances been sustained. But the subsequent language indicates by its enumeration, that he did not intend it should include real estate, for he continued, "consisting of household furniture, clothing, beds and bedding, money and cattle." He wills her his worldly goods, and tells what they are, thus restricting the meaning to personal property. He next wills the debts due him, which as rights of action do not ordinarily fall under the designation of "goods." He next proceeds to dispose of his real estate, making special mention of it, which naturally excludes that kind of property from the operation of the language, which he had restricted to certain personal property. If he had other real estate in his mind at the time, he would naturally have mentioned it, when making specific devises of such property.

If the term "all my worldly goods" in the first part of the will is to be construed as including real estate unmentioned, then the clause relating to the real estate mentioned, will have to be construed as an exception to the devising intent of that clause, because it gives only a life

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estate to the devisee in respect to the house and lot so mentioned. This construction cannot be accepted, for the reason that the language relating to the house and lot has neither the force nor purport of an exception.

This theory of interpretation is not urged by the plaintiff. But in maintaining that the term "worldly goods" includes the real estate in suit, he admits and contends that only a life estate was given to the widow in the goods, chattels, money and rights of action, as well as the real estate mentioned; and following out this interpretation to its proper conclusion, he insists that the will should be construed as if it read as follows: "I give and bequeath to my beloved wife, Amaranthe Honore, all my worldly goods, to be by her enjoyed during her life, and at her death to belong to the child with which she is now pregnant, if it should survive her. My worldly goods consist of household furniture, clothing, beds and bedding, money and cattle, also debts due to me, likewise a house and lot, which I now occupy, in the city of St. Louis. If the unborn child does not survive its mother, then the said house and lot is to be vested absolutely in my wife, to be disposed of as she may think proper." But the language of the instrument will not admit of this transposition, for the simple reason that the life estate by the express language used is confined to the house and lot. The house and lot were "to be by her enjoyed during her life," and in the event of her surviving the child, then the "house and lot" were to be hers absolutely. To extend this limitation to the personal property mentioned and the real estate unmentioned, would be equivalent to making a will for the testator, instead of accepting the one he left.

It is urged by plaintiff that another interpretation would be in violation of the rule that a testator, in making 3. WILLS: presumption against intestacy. a will, is presumed to intend the disposition of his whole estate, and not to die intestate as to any part of it. This is a natural presumption which ought to have weight in construing doubtful phrases.

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Ibbetson v. Beckwith, Talbot's Cases 161; *Winchester v. Foster*, 3 CUSH. 366. But no implication of this kind can supply the actual intent of the testator to be derived from the clauses of the will. The rule has generally been applied in the construction of the subsequent clauses of a will, when the first or prefatory clause disclosed the actual intent to devise everything. *Gaines v. Fender*, 57 Mo. 342. In *Leake v. Robinson*, 2 Mer. 385, Sir William Grant, Master of the Rolls, remarks: "There is certainly a strong disposition in the courts to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's property." But when the clause to be construed cannot be connected with some other part of the will disclosing that intent, there seems to be no good authority for application of the rule. *Denn v. Gaskin*, Cowp. 657; *Right v. Sidebotham*, 2 Doug. 759; *Smith v. Hutchinson*, 61 Mo. 83; *Bowlin v. Furman*, 34 Mo. 39. And even when the actual purpose to devise everything is indicated, it cannot prevail in the absence of language sufficient to carry everything.

It is possible that the testator thought that he had devised everything he possessed. His language does not include the outlying claim in the Grand Prairie, and there is no evidence from the will or otherwise, that he had it in mind at the time of making his will. It had cost his father only thirty-three livres payable in doeskins, which would be about \$6.60, and the value of it was probably not sufficient to make it such an important matter, if he should die intestate with respect to it.

Upon the whole it seems to me that the testator did not intend to devise his lands under the term "goods;" that a plain and natural meaning is given to every other part of the will without including the recognition of such an intent, and that too without leading to anything like total intestacy; and that such an intent cannot be evoked from the context of the will, without ignoring its obvious import and meaning. I concur entirely with the court of

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appeals in its interpretation of this will, and think its judgment should be affirmed. Accordingly it is so ordered. **PHILIPS, C.**, concurs; **WINSLOW, C.**, absent.

CARTER v. PRIOR et al., Appellants.

1. **Practice: SPECIAL JUDGE: WAIVER.** An objection made for the first time in the appellate court that the attorney, agreed upon by the parties to act as judge in the trial of the cause, did not before doing so take the requisite oath, will be disregarded.
2. **An Equitable Defense to a Common Law Action** will not have the effect of changing such action into a suit in equity.
3. **A Bill of Exceptions** may be signed and filed as well after as before the allowance of the appeal, following *State v. Dodson*, 72 Mo. 283, and overruling *State v. Musick*, 7 Mo. App. 597.
4. **A Bill of Exceptions**, presented and filed in vacation, requires the consent of both parties and the concurrence of the court expressed on the record; a mere stipulation between the parties will not answer.
5. **The Filing of a Bill of Exceptions**, if in term time, must be proven by the record, if in vacation, by the indorsement thereon of the filing of such bill by the clerk.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

H. C. Lackland for appellants.

Edward S. Carter for respondent.

PHILIPS, C.—This is an action of ejectment to recover possession of sixty-one acres of land in St. Charles county. The defendant, **Prior**, being the tenant of John B. Allen, the latter was admitted to defend as the real party in interest.

From Allen's answer it appears that in 1868 he conveyed forty acres of this land to one Cone, who executed

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to Allen four notes and a deed of trust on the forty acres. Cone quit the country, abandoning the contract, and Allen entered into an arrangement with one Lobeck, by which, in case Allen became the purchaser of the forty acres at the anticipated trustee's sale, he would convey the same, together with the remainder of the sixty-one acres, to Lobeck. In July, 1869, Allen executed to Lobeck a warranty deed, acknowledged January 1st, 1870, to the sixty-one acres, taking in exchange four notes, aggregating \$1,525, secured by deed of trust on the land. In December, 1869, Allen became the purchaser of the forty acres under said trustee's sale. In December, 1869, Allen assigned to W. L. Carter two of the Lobeck notes in part payment of a note of Carter's, on one Pierce, the payment of which Allen had assumed. In February, 1875, there was a settlement of matters between Carter and Allen and Lobeck. Allen owed Carter, and Lobeck owed Allen and Carter. Lobeck gave Carter a note for \$1,141.74, and executed to him a deed of trust on this land to secure it. There was then owing by Lobeck on the notes held by Allen \$200. Carter died after this, in 1875. In 1877 Allen sold the forty acres under his deed of trust and bought it in. He was then in possession of the forty acres. In March, 1877, the plaintiff, the heir and devisee of W. L. Carter, foreclosed the second Lobeck deed of trust, and became the purchaser and obtained trustee's deed for the sixty-one acres. The answer alleged that W. L. Carter and plaintiff took with full notice of his unrecorded deed of trust.

The reply alleged that in the settlement, had in February, 1875, it was agreed and understood that Allen was to cancel his deed of trust for the unpaid \$200 and look to the personal promise of Lobeck therefor, and that Carter should credit Allen with the amount of Lobeck's indebtedness to Allen less the \$200. Accordingly, Carter gave Allen the credit, and Lobeck then made Carter the \$1,141 note and deed of trust to secure it.

By agreement of parties, Joseph H. Alexander was se-

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lected to try the cause, to whom the trial was submitted, a jury being waived, verdict and judgment for plaintiff. Defendant appealed to the court of appeals where the judgment was affirmed, and the defendant has appealed to this court.

The defendant raised for the first time in the appellate court the objection that the special judge did not take the ^{1. PRACTICE: special} requisite oath before sitting in the trial of ^{JUDGE: waiver.} the cause. This question has been decided adversely to the defendant in *Grant v. Holmes*, 75 Mo. 109.

The next objection alleged against the record proper is, that according to defendants' view, the answer presented ^{2. AN EQUITABLE DEFENSE TO A COMMON LAW SUIT.} an equitable defense, and the judgment in the case is defective in that it does not find the facts or declare the issues as found for the plaintiff, as in a chancery proceeding. If the position were tenable it is not perceived why defendant should complain, or of what avail it would be to him. It at most would be but an informal entry of judgment which this court could enter *pro forma* here, or remand the cause with directions to the circuit court to enter the formal judgment. But the defendant is under a misapprehension as to the office of the answer. It had not the effect to change the character of the action. It practically remained one at law in ejectment, in which either party would have been entitled to a jury. *Wolf v. Schaeffer*, 4 Mo. App. 372; affirmed, 74 Mo. 154.

The remaining errors assigned are such as arose *en pais* in the progress of the trial, and, therefore, are not reviewable here, unless properly preserved in a ^{2. A BILL OF EXCEPTIONS.} bill of exceptions. Is there any bill of exceptions in contemplation of law in this record? Plaintiff's counsel contends that, as the bill of exceptions was not signed and filed until after granting the appeal, the court had no jurisdiction then to pass on the bill and make further record in the cause, and cites in support *State v. Musick*, 7 Mo. App. 597. This reference gives only an abstract of the point decided. What the state of facts in full was,

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upon which this declaration was based, does not appear. As an abstract principle, I cannot assent to it. The statute expressly allows the entire term in which to prepare and file the bill of exceptions, (R. S., § 3636;) and, therefore, it can make no difference that the appeal is granted before or subsequent to the filing of the bill of exceptions. *State v. Dodson*, 72 Mo. 283. This would not be different where the bill of exceptions was filed in vacation, for the appeal itself must be perfected during the term, and when the bill is filed in vacation, it has relation to, and becomes operative, as of the term.

But there are serious objections to what purports to be the bill of exceptions. The clerk in the transcript recites: 4.— “And afterward, on the 19th day of December, 1878, the following stipulation as to time of filing bill of exceptions was filed, to-wit: Carter against Prior and Allen, ejectment. It is hereby stipulated between the parties hereto that the defendants may file their bill of exceptions in said cause, at any time in vacation, on or before February 10th, 1879, with the same effect and force as if filed in term time, provided the bill of exceptions be presented to the plaintiff’s attorney on or before February 1st, 1879, and this agreement shall become a part of the record. McDearmon & Gauss, C. J. Walker and Williams & Carter, attorneys for plaintiff; John B. Allen, attorney for defendant.” This is merely a stipulation between the parties that the defendants may file their bill of exceptions in vacation. The record wholly fails to show that the court consented that the statutory period might be so extended and so ordered. To present and file a bill of exceptions in vacation, requires the consent of both parties and the concurrence of the court expressed on the record. *Robart v. Long*, 65 Mo. 223; *Peake v. Bell*, 65 Mo. 224; *McCarty v. Cunningham*, 75 Mo. 279.

Nor is there anything in this record to show that what purports to be a bill of exceptions was ever filed in the

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6. THE FILING OF A BILL OF EXCEPTIONS court or clerk's office. If filed in term time, the record of the court should prove the fact. Nothing short of this will suffice. *Pope v. Thompson*, 66 Mo. 661. If filed in vacation, the fact must be evidenced by the indorsement of the clerk of the filing on the bill of exceptions. As the making of the record is a *quasi* judicial act, the clerk in vacation has no authority to make an entry of record, except when conferred upon him by statute. In term time he acts ministerially and enters of record the orders of the court. In vacation the bill of exceptions may be filed in the clerk's office by consent of parties, and the concurrence of the court entered of record in term time, and the evidence of that filing is the indorsement of the clerk thereon, the only act thereto relating which he can perform in vacation.

There are, therefore, no errors cognizable by bill of exceptions before this court, and as I find no error in the record proper, the judgment of the court of appeals and the circuit court is affirmed. MARTIN, C., concurs; WINSLOW, C., absent.

ARNOLD v. SCHOOL DISTRICT, *Appellant.*

Schools : MISCONDUCT OF TEACHER : REMEDY AGAINST HIM. Under the present law the board of directors of a public school district have no power to discharge a teacher for cruel treatment and profane and abusive language used toward pupils. The law gives the county school commissioner power to revoke his certificate for "incompetency or immorality proven," and when this is done he is disqualified from further teaching in the public schools of that county. Such treatment and language used toward pupils fall within the definition of "incompetency or immorality;" and the remedy is through action by the commissioner. HOUGH, C. J., and HENRY, J., dissented.

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*Appeal from Boone Circuit Court.—HON. G. H. BURCKHARTT,
Judge.*

AFFIRMED.

S. Turner for appellant, cited *Puterbaugh v. Township Board*, 53 Mo. 472; *McCutchens v. Windsor*, 55 Mo. 149; *Fitzgerald v. Hayward*, 50 Mo. 516; *State v. Foerstel*, 2 Mo. App. 497.

S. G. Douglass for respondent, cited 1 Dillon Munic. Corp., p. 96, § 10 a; *Morley v. Power*, 5 Lea (Tenn.) 691; s. c., 12 Cent. L. J. 540; *McCutchens v. Windsor*, 55 Mo. 151; *Pittman v. Adams*, 44 Mo. 586; *Geter v. Commissioners*, 1 Bay 354; *Singleton v. Commissioners*, 2 Bay 105.

MARTIN, C.—This action was commenced on the 21st day of July, 1879, for the purpose of recovering wages as a teacher. It is alleged in the petition that plaintiff entered into a written contract with the directors of defendant, by the terms whereof he was to teach the school of said district for the period of four months, beginning on the 9th day of September, 1878, and was to receive therefor a salary of \$40 per month; that he entered upon the discharge of his duty under the contract, and taught said school for about seven weeks and two days, until about the 30th day of October, 1878, when the directors of defendant locked up the school house and prevented the further discharge of his contract; that he had repeatedly tendered his services under said contract and had held himself in readiness to comply with his part of the same, but that defendant refused to accept his further services or to pay him for the time of his employment, wherefore he asked for a judgment in the sum of \$120, the amount of the residue coming to him under said contract. There is another count for extra services as janitor, for preparing fires and cleaning

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the school house, for which he asked a judgment in the sum of \$10.

The answer of defendant admits the hiring and the time of actual service as alleged, and pleads a tender of \$34, being the residue owing to plaintiff for the time of his actual service. The answer then concludes with the following special defense: That at the time of making the contract with respondent, it was distinctly understood and agreed that respondent should, in the government of the scholars, observe the written rules theretofore in force in the school, which rules were talked over and explained to the respondent; that among other things said rules prescribed that the teacher should subject no pupil to corporal punishment, until the directors should be consulted and their assent obtained, and that the teacher should be patient and kind to the pupils; that respondent, in September and October of said year, in managing and conducting the school, repeatedly disregarded and broke said rules, by the infliction of corporal punishment upon his pupils without consulting the directory; that respondent, during said months, gave way to violent outbursts of temper and cursed and abused his pupils, and beat and abused them in a cruel and brutal manner after he had been warned not to do so by the directors; that finally, after due notice to respondent, the directors dismissed respondent as teacher on or about the 30th day of October, as they averred it was their right and duty to do, and about the day stated (30th October) the directors locked up their school house and refused to accept his further services as teacher. The answer again tendered respondent the warrant aforesaid, for \$34.

At the November term, 1879, of the circuit court, when the cause was called for trial, the respondent withdrew his reply to the answer, and filed his demurrer to "so much of defendant's answer as sets up plaintiff's cruel and abusive treatment of the scholars in his school, for the reason that the same contains no defense to this action," which demurrer was sustained by the court, and appellant excepted.

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Thereupon the trial was proceeded with as to the issues embraced in the answer not reached or covered by the demurrer.

The plaintiff gave evidence tending to prove that he tendered his services and his monthly reports during the whole term of his contract; that he obtained no other engagement and was not fit for other business; that the directors failed to have the house swept or fires made as they had agreed to, and that he had attended to such duties, and had expended fifty cents for fuel, and that his services as janitor were worth \$10.

On the part of defendant the evidence tended to prove that a copy of the rules was given to plaintiff when he signed the printed contract of hiring. The rules were then offered and excluded. It further appears from defendant's testimony that about the 20th day of October, 1878, complaints were made to the directors about the treatment of the scholars by plaintiff; that about the 25th day of October, 1878, they met and investigated the charges, and requested plaintiff to quit teaching, which he refused to do; that thereupon they locked up the school house on the 30th day of October, 1878, and gave plaintiff a written notice of his discharge as teacher. It also appears that the directors offered to prove that the plaintiff, in the school house and during school hours, had knocked down a scholar by the name of Jones with a billet of stove wood, and had stamped on another by the name of Peyton, and had indulged in a multitude of profane and objurgatory expressions while conducting these physical exercises. This evidence was excluded. Thereupon the jury found a verdict for the plaintiff in the sum of \$120.50.

The single question presented in the case is, whether the directors had the lawful right to terminate the plaintiff's contract of employment and discharge him from his position in the school as a teacher. A brief review of the school law bearing on this question may assist us in giving to it a proper answer.

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The 6th section of the school law in the statutes of 1865 gave the local school directors the power to employ teachers and the qualified power to dismiss them. Gen. St. 1865, p. 258, § 6. It read as follows: "It shall be the duty of the school directors in each sub-district to manage and control its local interests and affairs; to employ teachers; to certify the amount due them for services to the township clerk, who shall draw an order on the county treasurer as hereinafter provided; and to dismiss any teacher at any time for such reasons as they may deem sufficient; provided such dismissal shall receive the sanction of the township board." It will be observed that to render a dismissal valid, it had to receive the sanction of the township board of education. This board could also discharge the duties of the local directors when they failed or refused to do so. Gen. St. 1865, p. 260, § 12.

Subsequent to this, the school law underwent a revision which appears in Wagner's Statutes of 1870. The power of the directors to dismiss teachers seems to have been left out of this revision. The 7th section reads as follows: "It shall be the duty of the directors in each sub-district to manage and control its local interests and affairs. They shall have the power to contract with and hire legally qualified teachers, for and in the name of the sub-district, which contract shall be in writing, and shall specify the number of months the school shall be taught and the amount of wages per month. Such contract shall be filed with the clerk of the sub-district, and a copy thereof shall be filed with the township clerk." 2 Wag. Stat., p. 1248, § 7.

The law of 1870, for the first time created a county superintendent whose duty it was, among other things, to examine teachers and give certificates of qualification, which should be for a period of not less than six months nor more than two years. The directors could employ no one who did not hold a certificate of qualification from the county superintendent. 2 Wag. Stat., p. 1252, § 47; p.

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1253, §§ 51, 53, 54. While the superintendent was empowered under this law to issue certificates, and was required to keep a registry of all his issues, he seems to have been without the power to revoke or annul any of them. It thus appears that the express authority to dismiss or discharge teachers was left out of the school law of 1870. While the law was in this condition Judge Wagner, in *McCutchen v. Windsor*, 55 Mo. 151, in construing the 7th section above recited, said: "The only power delegated to the directors in this section is to employ legally qualified teachers. They must see that he is legally qualified and then they may hire him by making a contract in writing; and so far as any direct provision in the statute is concerned, here their authority ends. If any power of dismissal exists, it is to be deduced by implication only." He thinks that cases might occur which would justify the directors in removing the teacher. It must be admitted that the school law as revised in 1870 was palpably defective in leaving so important a power as the right of dismissal, to be inferred by implication, after it had been expressly given to them in the revision of 1865, subject to the sanction of the township board of education. The construction intimated by Judge Wagner rests upon the necessity of the case in the absence of any other method or remedy provided by the law to meet the possible abuses alluded to by him.

But in the revision of the school law of 1874, under which the dismissal in this case took place, the power to discharge teachers is practically lodged with the county commissioner, an officer who takes the place of the former county superintendent. This act of 1874 is embodied in the revision of 1879, and on this subject reads as follows: "It shall be the duty of said commissioner to examine all persons presenting themselves for that purpose, and if found qualified, to grant them certificates as teachers of public schools within said county. * * * The certificate thus granted, to be of force only in the county for which it was granted, shall not be issued for a period of less than

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twelve months nor longer than two years, to be graduated by the character of the examination the applicant sustains, and may be revoked for incompetency or immorality proven. A record of all certificates granted and revoked shall be kept by the commissioner." R. S. 1879, § 7083. The power of the directors is contained in section 7046, and reads as follows: "The board shall have the power to contract with and employ legally qualified teachers for and in the name of the district. The contract shall be signed by the teacher and a majority of the directors; it shall specify the number of months the school is to be taught and the wages per month to be paid, and, with the certificate of qualification, shall be filed with the district clerk, who, at the expiration of the term, shall return said certificate to the teacher."

It will be seen from these provisions that the power of the directors to contract for a teacher is limited to one who is qualified by a certificate under the hand of the commissioner, which has to be filed with the clerk of the board of directors along with the contract, and must be returned to the teacher at the expiration of his term. The contract of the teacher under this school law is made with reference to the power of the commissioner to revoke it. When that power is exercised in accordance with the terms of the law defining it, the right of the teacher to pursue his vocation in the school where he happens to be or in any other school in the county is at an end. Any contract to teach which he may hold is necessarily terminated by such revocation in accordance with the conditions imposed upon it by the law when he entered into it; and he is in consequence of the revocation dismissed and discharged. He can neither teach nor sue for any further teaching in the county.

The acts for which the plaintiff in this case was dismissed by the directors, were such as fall within the definition of "incompetency or immorality," for which the commissioner is expressly authorized by law to revoke his certificate and terminate his office and contract as a teacher

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under the school law. The directors are not possessed with this power. It has been expressly given to the commissioner and is no longer left to the directors by implication and necessity. If the acts of the plaintiff complained of to the directors were sufficient in their judgment to justify his dismissal, they should have reported them to the commissioner, so that his office and position in the school and county as a teacher might be terminated according to law. As no charges were brought against him before the commissioner, there is no occasion for us to consider how the commissioner should have proceeded upon being informed of them. The law seems to contemplate that the acts of "incompetency or immorality" for which he revokes the certificate, shall be in some way "proven."

I do not wish to be understood as implying that the directors, as the guardians of the "local interests and affairs" of the school, are not possessors of their customary, necessary and proper powers in that behalf. They have possession and control over the school property. They have the power, and it is their duty, to preserve it from damage and trespass. It is their duty also to see to the safety, health and comfort of the scholars attending the schools, and to protect them from assaults and outrages, whether coming from teachers or trespassers. Emergencies of this character may arise in which they would be justified in locking out both scholars and teachers. The incidental effect such necessary measures might have upon the teacher's contract when he sues for wages, is not germane to the issues in this case.

The directors did not assume to act under the pressure of any such emergency. They assumed by notice to terminate his relation to them as a teacher, and they locked him out because of that supposed termination. As the power to do this was vested elsewhere under the law of 1874, it only remains for us to affirm the judgment for the wages called for in his contract. Accordingly it is so ordered. PHILIPS, C., concurs; WINSLOW, C., absent.

The State v. Burgess.

For the reasons given in the foregoing opinion, NORTON, RAY and SHERWOOD, JJ., were of opinion that the judgment of the circuit court should be affirmed.

HOUGH, C. J., and HENRY, J., were of opinion that for the matters confessed by the demurrer, it was not only the right but the duty of the directors to dismiss and discharge the plaintiff. The contract was for personal services, and the acts charged constituted such a breach of that contract as warranted the directors in declaring the contract at an end, regardless of the right of the commissioner to revoke plaintiff's certificate.

THE STATE v. BURGESS, *Appellant.*

1. **Change of Venue:** FINDING OF TRIAL COURT. The trial of the issue made on a petition for a change of venue, is by the court, and unless manifest error occur to the prejudice of the accused, the appellate court will not interfere with the finding.
2. — : OPINIONS OF WITNESSES. Upon the trial of this issue it is error to take the opinions of witnesses as to whether the applicant can have a fair trial or not; they should be interrogated as to facts tending to show whether there is or is not prejudice. But if there is enough other evidence to support the finding of the court, the judgment will not be reversed for error in this particular.
3. **Juror, Having an Opinion.** The statute provides that an opinion founded only on rumor and newspaper reports, if not such as to prejudice or bias the mind of the juror, shall not disqualify him. R. S. 1879, § 1897.
4. **Murder: MANSLAUGHTER.** The evidence in this case warranted the court in instructing the jury both as to murder in the first degree and manslaughter in the second degree.

*Appeal from Platte Circuit Court.—HON. GEO. W. DUNN,
Judge.*

AFFIRMED.

The State v. Burgess.

J. E. Merryman, R. P. C. Wilson and S. C. Woodson for appellant.

D. H. McIntyre, Attorney General, for the State.

HENRY, J.—The defendant, George E. Burgess, was indicted for the murder of Caples Burgess. He was tried at the March term, 1883, of the Platte circuit court, found guilty of manslaughter in the second degree, and sentenced to imprisonment in the penitentiary for a term of five years, and he has appealed from the judgment.

At the same March term he presented his petition for a change of venue, alleging that the inhabitants of Platte county were so prejudiced against him that he could not have a fair trial in that county. Witnesses were introduced by defendant to establish the fact alleged in his petition, and by the State in rebuttal, and defendant complains that witnesses called by the State were permitted to give to the court their opinion that defendant could have a fair trial in Platte county, and that one of said witnesses, R. L. Waller, was permitted to state that any man could obtain a fair trial in that county. The witnesses for defendant had testified in relation to the feeling in the county against the defendant, as indicated by expressions they had heard from the inhabitants in regard to the case. They expressed no opinion, except one Cockrell, who thought defendant could have a fair trial. Some of the witnesses for the State said nothing as to the fact of prejudice existing against defendant or not, but merely expressed their opinion that defendant could have a fair trial; others, six in number, Shouse, Garvin, Todd, Carson, Hull and Cecil, that they had heard but little about the case and knew of no prejudice against defendant, and Cockrell, one of defendant's witnesses, also stated that defendant could have a fair trial. The court refused the application.

The trial of the issue made on a petition for a change of venue, is by the court, and unless manifest error occur

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1. CHANGE OF VENUE: finding of trial court on the trial of that issue, to the prejudice of the accused, we cannot interfere with the finding of the court. There was evidence to sustain the finding.

It was error to take the opinion of witnesses, as was done in this case, yet, under the circumstances, it was not 2. — : opinion of witnesses. such an error as would justify a reversal of the judgment. Whether the alleged prejudice exists or not, is a matter of fact. The witnesses for the State may have believed, or known the facts, testified to by defendant's witnesses, and yet entertained the opinion expressed by Waller, that any man could obtain a fair trial in Platte county. It was not for witnesses to say, whether the inhabitants of that county, notwithstanding their prejudice against the accused, could rise above it in the jury box, and deal fairly and impartially with the defendant. It must be such a prejudice as will prevent a fair trial, but the extent and character of the prejudice are facts upon which the court is to determine whether it is such prejudice as will prevent a fair trial. The facts are to be testified to by witnesses, and the opinion is to be formed by the court on the facts. If there had been no other evidence for the State on that issue, but that of these witnesses, we are inclined to the opinion, that the change of venue should have been awarded.

Defendant's counsel also insist that E. O. Waller, one of the panel of forty, was an incompetent juror, he having 3. JUROR, HAVING AN OPINION. "formed and expressed an opinion as to the guilt of the accused, both from rumor and testimony published, and he said it would take other evidence to change his opinion." That was not what Waller said. We copy from the bill of exceptions what he did state: "I have not talked with any of the witnesses. I read a newspaper account of the case while I was away. I have formed an opinion from rumor or newspaper accounts of the case. That opinion is not such as to prevent me giving the defendant a fair and impartial trial, accord-

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ing to the evidence in the case." The statute provides that an opinion founded only on rumor and newspaper reports, if not such as to prejudice or bias the mind of the juror, shall not disqualify him.

The alleged error with respect to the instruction as to murder in the first degree, does not relate to its substance, ^{4. MURDER: man-slaughter.} but the objection is that there was no evidence to warrant such an instruction. We do not agree with counsel, but think there was evidence sufficient to warrant an instruction on that degree of murder. There was an old feud between the defendant and Caples Burgess, and when the latter cursed Dean for mistaking him for and calling him George, the defendant, instead of paying no attention to the remark of a drunken man, replied, "George is a good name," and immediately after the fight commenced. There were other circumstances which it is unnecessary to detail, taken in connection with that just mentioned, which fully warranted the instruction.

Nor did the court err in giving an instruction defining manslaughter in the second degree. Counsel for defendant contend that it was error, "because the evidence shows that deceased committed the first assault, and followed it up with violence," etc. The defendant testified that deceased struck the first blow, but no other witness so testified, and the argument of counsel assumes that the jury was bound to believe the defendant's statement. The credit to be given to defendant, as a witness, was a matter for the consideration of the jury, and the court could not, in instructions, have assumed, as an established fact, what the jury might have found otherwise.

The judgment is affirmed. All concur.

Hurley v. Taylor.

HURLEY, *Appellant*, v. TAYLOR.

Fraudulent Conveyances. If a conveyance is made without consideration, it is void as to existing creditors, without more. As to subsequent creditors it is void if it is made with intent to hinder, delay and defraud them. If it is founded on a valuable consideration, it will be held valid notwithstanding such fraudulent intent, unless the grantee participated therein.

Appeal from Jasper Circuit Court.—HON. JOSEPH CRAVENS,
Judge

AFFIRMED.

McReynolds & Halliburton for appellant.

Joseph Cravens and Spencer & Thomas for respondent.

MARTIN, C.—This was a suit in equity commenced on the 23rd day of April, 1879, by a judgment creditor, who had become a purchaser at execution sale of two lots in Holman's addition to the city of Carthage, as belonging to his debtor. He sought to have certain conveyances set aside, as having been made without consideration and for the purpose of hindering, delaying and defrauding creditors.

It appears from the evidence that the plaintiff, on the 19th day of March, 1878, recovered a judgment against Meredith Taylor in the sum of \$702.90 and costs; that in executing this judgment he levied upon the lots in controversy, and on the 26th day of March, 1879, he purchased the same at execution sale as the property of said Meredith Taylor. It is true that these lots belonged to Meredith Taylor prior to the 20th day of February, 1877, but at that date he conveyed the same to John H. Taylor, his brother, for an expressed consideration of \$1,000, but in fact for no consideration whatever. On the 16th day of January, 1878, said John H. Taylor conveyed said lots to Adelia Taylor, wife of said Meredith, for an expressed consideration of \$2,000, but in fact for no consideration at all. This placed

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the record title in Adelia Taylor. On the 23rd day of May, 1878, she, joining with her husband, conveyed the lots by mortgage deed, to defendant, Jno. C. Cox, to secure a note of \$1,200 described in it, which note was given to secure a loan of \$1,000 borrowed from said Cox. It appears from the evidence that said Cox loaned his money upon the faith of Mrs. Taylor's record title, as disclosed by the abstract of title furnished by the examiner. There is no evidence that he knew anything about the previous conveyances, except as they appeared of record, all reciting valuable considerations paid for them. About \$502 of the loan went to pay off an incumbrance on the mortgaged lots, and the balance was expended in building a house in Joplin. There was some evidence showing that Meredith Taylor was in debt at the time of his conveyance to John H. Taylor.

On this evidence the court entered up a decree setting aside the conveyance of Meredith Taylor to John H. Taylor, and the conveyance of John H. Taylor to Adelia Taylor; but found that defendant Cox had loaned his money and taken the mortgage in good faith; and gave the plaintiff the right to redeem the lots by paying Cox the money loaned by him within six months from the date of the decree, amounting to \$1,000 with interest. The decree substantially vested the title of the lots in plaintiff subject to the mortgage of defendant Cox. From this decree the plaintiff alone has appealed.

He insists that the mortgage deed held by Cox should also have been set aside as fraudulent. But this position cannot be sustained under the evidence before us. So far as the deeds of Meredith Taylor and John H. Taylor are concerned the decree is supported by the evidence. These deeds being without consideration were void as to existing creditors. And as to subsequent creditors, they were void if made with the actual intent to hinder, delay and defraud them. But the mortgage deed to Cox rests upon a more solid foundation. Being made for an adequate valuable consideration, it is expressly within the protection of the

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statute against fraudulent conveyances if made *bona fide*. R. S. 1879, § 2502. The plaintiff has alleged in his petition, that there was no such consideration for the mortgage as it recites. The evidence disproves this allegation. To render such an instrument void it would be necessary to show that it was made and contrived with the actual intent of hindering, delaying and defrauding creditors, as for instance to cover up and conceal the property of the debtor, or to raise funds which were to be kept from the reach of process or payment of debts, and that the grantee participated in this intent. It is needless to say that the record fails to disclose any want of good faith in Mr. Cox, when he parted with his money and accepted this mortgage to secure his debt. Neither was there anything to put him on his inquiry as to the true character of the previous conveyances; they all recited valuable considerations, thus advising him of their validity. *Odle v. Odle*, 73 Mo. 289.

The decree is affirmed. PHILIPS, C., concurs; WINSLOW, C., not sitting, having been of counsel.

THE STATE V. SNELL, *Appellant.*

1. **Murder: INDICTMENT.** An indictment for murder examined and *Held* to contain sufficient averments, (1) That the assault, stabbing and wounding were done feloniously, willfully, etc.; (2) That deceased, after being wounded by defendant, "languished till September 29th, 1881, and then and there died" from the effects of the wound.
2. — : — . In an indictment for murder an allegation that the wound was mortal and caused the death is sufficient; it is not necessary to describe it so as to show that it was of a character likely to produce death.
3. — : "FELONIOUSLY." An erroneous definition of the word "feloniously," *Held* not to be reversible error in this case, it being apparent that the defendant could not have been prejudiced by the error.

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4. ——: "PREMEDITATION." The definition of "premeditation" as "thought of beforehand for any length of time however short," adhered to.
5. ——: "DELIBERATION." An incorrect definition of "deliberation," *Held*, not to be reversible error, the defendant not having been convicted of murder in the first degree.
6. ——: INSTRUCTION: DRUNKENNESS. An instruction that drunkenness is no excuse for crime, although there was no occasion for giving it, the defense not having been based upon the defendant's intoxication, *Held*, not to be reversible error, as it could not possibly have prejudiced the defendant.
7. ——: MANSLAUGHTER. Where the evidence shows that the offense was either murder of the first or second degree, it is not error to refuse instructions as to manslaughter.
8. ——: RES GESTAE. Declarations of the parties to a conflict made after it is over and they have been separated, are not part of the *res gestae*.

Appeal from Clinton Circuit Court.—Hon. Geo. W. Dunn,
Judge.

AFFIRMED.

Woodson, Porter & Hughes for appellant.

D. H. McIntyre, Attorney General, and *James W. Coburn*, for the State.

HENRY, J.—At the September term, 1881, of the circuit court of Platte county, the defendant was indicted for the murder of Stephen T. Newman. On his application a change of venue was awarded, and the cause sent to the circuit court of Clinton county, and at the March term, 1882, of said court, he was tried and found guilty of murder in the second degree, and his punishment assessed at twenty years' imprisonment in the penitentiary, and he has prosecuted his appeal from the judgment.

Several objections are made to the indictment: 1st, That it does not charge the wounding "to have been done ^{1. MURDER: indict-} feloniously, willfully, deliberately, premeditatedly and of malice aforethought." It

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alleges that: "with a certain knife, * * which he, the said Clay Snell, in his right hand then and there had and held, him the said Stephen T. Newman feloniously, willfully, deliberately, premeditatedly and of his malice aforethought, did strike, stab and thrust in and upon the body, giving to the said Stephen T. Newman then and there with the knife aforesaid, in and upon the body of him, the said Stephen T. Newman, one mortal wound." The stabbing was alleged to have been done feloniously, willfully, etc., and the wounding was the immediate result of the stabbing, and this was a sufficient allegation that the assault, stabbing and wounding were done "feloniously," etc.

2nd, It is contended that it is not alleged that "deceased was wounded on the 2nd day of September, 1881, and languished until the 29th day of September, 1881, and then and there died from the effects of the wound." The language of the indictment is as follows: "Of which mortal wound, the said Stephen T. Newman, from said 2nd day of September, 1881, until the 29th day of September, 1881, at the county aforesaid, did languish, and languishing did live, on which 29th day of September the said Stephen T. Newman, in the county aforesaid, of the mortal wound aforesaid, did die." From this it will be perceived that the objection is unfounded.

Another objection is, that the wound is not so described as to show that it was of a character likely to produce death. 2. — : —. It is not necessary that it should. Describing it by its length, width and depth, would not necessarily show that it was a mortal wound. It is sufficient to allege that it was a mortal wound, and caused the death of the party.

The second instruction for the State defined the word "feloniously" to mean "wrongfully, without just cause or ~~any~~ excuse, not accidentally." The definition of the word is certainly incorrect, but there was no necessity for defining it. It is employed to classify offenses, but is not a distinct element of a crime. If the

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facts proved establish a felony, then the crime was committed feloniously—if they establish a misdemeanor, the offense was not feloniously committed. A correct definition of the word could not have aided the jury in their deliberations, nor could the incorrect definition, in this instance, possibly have prejudiced the defendant's case, or been an obstacle in the way of the jury to a proper verdict on the law and the facts.

It is also insisted that the court erred in defining pre-meditation to be "thought of beforehand, for any length of time, however short." That definition has ^{been} too often and too long had the sanction of this court, to be modified or repudiated now.

The definition of deliberation in the instruction is not correct, but the defendant was not convicted of murder in the first degree, and the jury gave him the benefit of the law, to the same extent as if the court had declared it, by finding that there was such heat of passion, other than technical heat of passion, as under the decisions of this court, reduce a homicide from murder of the first degree, to the second degree of that crime, and therefore, the error complained of will not warrant a reversal of the judgment.

By the eighth instruction for the State the jury were told that: "Drunkenness is no excuse for crime." There was evidence tending to prove that defendant was drunk when he stabbed Newman, but the court might well have omitted the instruction. It was a correct declaration of an abstract proposition of law, but as the defense was not based upon the intoxication of the defendant, there was no occasion for giving an instruction on that subject. It is no ground for reversal, that the court burthened the record with an instruction announcing a mere abstract principle of law, unless it may possibly have prejudiced defendant. As a general rule, it is error to give an instruction not based upon competent evidence or an issue in the cause. This, however, is because it might

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have misled the jury into the belief that there was evidence upon which it was based, and that it may have influenced their verdict. But here it was wholly immaterial whether defendant was drunk or sober. If the jury found either that he was drunk or sober, they could have found him guilty of no higher crime than murder in the first degree, and, under the instructions, whether he was drunk or sober, he could not have been found guilty of a less offense than that of which he was convicted, murder in the second degree. They could not have found him guilty of any crime solely because he was drunk, and of the instruction of the court that drunkenness was no excuse for crime. By that instruction they were told in substance, and they could not possibly have misunderstood it, that although defendant may have been drunk when he stabbed Newman, they should try the cause as if he had been sober.

The court did not err in refusing to instruct as to manslaughter of any degree. The evidence clearly shows that defendant repeatedly sought a difficulty with deceased on the day the homicide occurred, and that deceased endeavored to avoid it; that after angry words had passed between them, defendant was led away, but in a short time returned, with an open knife in his right hand, to the gallery in which deceased was shooting at a target, and, approaching him, slapped him in the face with his left hand; that deceased kicked him, or kicked at him, and thereupon defendant stabbed him inflicting the wound of which Newman died. The offense was either murder of the first or second degree. There might be some question whether the one or the other; but a careful examination of the testimony has led us to the conclusion that if he would not rather have been hanged than imprisoned in the penitentiary, defendant has reason to be thankful that he escaped the gallows.

The court properly excluded evidence of a declaration made by Newman after he was stabbed: "That it was well for defendant that his, Newman's, gun was

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caught before he got stabbed, because, if it had not been caught, he would have killed defendant." It was no part of the *res gestae*, nor was it admissible as a dying declaration. *State v. Curtis*, 70 Mo. 597. It was made not while the parties were engaged in the conflict, but after it had terminated and they had separated.

The judgment is affirmed. All concur.

STANLEY, Appellant, v. BIRCHER'S Executor.

1. **Non-survival of Action for Personal Injuries.** An action for injuries to the person does not survive as against the executor of the wrong-doer.
2. **Inn-keepers: ACTION FOR INJURY TO GUEST.** The obligation resting upon an inn-keeper to keep his guest safe, is one imposed by law and not growing out of contract, and for violation of it the action is an action on the case for the injury sustained, and not an action for breach of contract.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Hermann & Reyburn and C. P. & J. D. Johnson for appellant, cited *Higgins v. Breen*, 9 Mo. 493; *Jewett v. Weaver*, 10 Mo. 234; *James v. Christy*, 18 Mo. 164; *Doedt v. Wiswall*, 15 How. Pr. (N. Y.) 132; *Vertore v. Wiswall*, 16 How. Pr. (N. Y.) 8; *Pozzi v. Shipton*, 8 Ad. & El. 963; *Bretherton v. Wood*, 3 Brod. & B. 54; *Tichenor v. Hayes*, 41 N. J. Law 193; *s. c.*, 32 Am. Rep. 186; *Redfield on Carriers*, §§ 596 to 601.

Russell & Wendling for respondent, cited *Nettleton v. Dinehart*, 5 Cush. 543, 544; *Faith v. Carpenter*, 33 Ga. 79; *Broom's Legal Maxims*, (7 Ed.) 904, *Raymond v. Fitch*, 2 C. M. & R. 597; *Wheatley v. Lane*, 1 Saund. 216; *Ham-*

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ble v. Trott, Cowp. 371; *People v. Gibbs*, 9 Wend. 29; *Hench v. Metzer*, 6 Serg. & R. 272; Walker's American Law, (7 Ed.) § 215, p. 655.

Broadhead & Haeussler also for respondent.

MARTIN, C.—This was an action for injuries to the person of plaintiff, alleged to have been caused by the negligence of the defendant's testator, who died on the 14th day of June, 1879. This action was brought on the 17th day of September following.

It is alleged in the petition that on the 10th day of June, 1878, Rudolph Bircher, the testator, was owner and proprietor of the Laclede-Bircher Hotel in St. Louis; that at the last mentioned date, the plaintiff, for a valuable consideration, became a guest in the hotel; that for the said consideration it became the duty of said Bircher and he agreed to furnish safe accommodations for the necessary and reasonable wants of the plaintiff; that he did not perform the duty or keep the agreement aforesaid in this, that in and adjoining one of the halls in the third story of the hotel, said Bircher maintained an elevator shaft or pit, reaching from the basement to the third story; that the door to it was unskillfully constructed and dangerous to guests, and was negligently left open by said Bircher and his servants; that at the date last aforesaid, the plaintiff, having occasion to retire to the water-closet, went into the hall-way where said shaft was located, and without any fault or negligence of hers, fell through the open door-way into said shaft and was precipitated to the bottom—a distance of about fifty feet, whereby she sustained great and serious bodily injuries, permanently laming her, for which she asked damages in the sum of \$25,000.

The defendant, as executor of said Bircher, demurred on the ground that the cause of action did not survive as against the administrator or executor of the estate, and that the petition did not state facts sufficient to constitute a

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cause of action. The demurrer was sustained and final judgment entered for defendant in the circuit court, which was affirmed in the court of appeals. 9 Mo. App. 99.

I am unable to perceive how the plaintiff can maintain her action, in the face of the statutes in force at the time of ^{1. NON-SURVIVAL OF} ACTION FOR PERSONAL INJURIES. 1865, section 29, under the head of administrators, reads as follows: "For all wrongs done to the property, rights or interest of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or, after his death, by his executor or administrator against such wrong-doer; and, after his death, against his executor or administrator, in the same manner and with the like effect in all respects as actions founded upon contracts." Gen. St. 1865, 491, § 29. If there was no limitation or exception to this section, the plaintiff's remedy would be secured to her. But the next section operates as an express limitation or exception to it, and leaves the plaintiff at common law. It reads as follows: "The preceding section shall not extend to actions for slander, libel, assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff or to the person of the testator or intestate of any executor or administrator." Gen. St. 1865, 491, § 30. At common law this action did not survive as against the executor or administrator. And we thus see that it is expressly excepted from the statute which assumes to change the common law in this respect.

But, it is claimed by counsel for plaintiff that the action is for the breach of a contract, and that it is not an action on the case for injuries to the person. The allusions in the petition to the formal contract between the plaintiff and the proprietor of the hotel, whereby the plaintiff became a guest in the hotel, cannot change the true character of the action. In setting forth an action of trespass on the case, the pleader often finds it proper, although not absolutely necessary, to mention matters of contract con-

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nected with the tort, by way of inducement and explanation. In this case the relation of host and guest which originated in contract, explains how the defendant's testator came to owe the plaintiff a duty. That duty, however, the law imposes. It is a public duty which is not defined by the contract. Neither can the proprietor relieve himself from that duty by contract. The action in truth is for a violation of the duty which the law imposes, independent of contract. Neither the damages nor the scope of the action can be measured or limited by the contract.

None of the cases cited from our reports will sustain the plaintiff's right of action in this case. In *James v. Christy*, 18 Mo. 164, a father sued a carrier for loss of the services of a minor child who had met his death as a passenger through the negligence of the defendant as a carrier. It was held that the father had a right of property in the services of his minor child, and that the defendant was liable to the father for any negligence which resulted in depriving him of that right. This right of action never belonged to the son and it could not, therefore, be said to die with his person. It was regarded as an action for a wrong done to the "property" rights of the father, within the provision of the first section hereinbefore cited, and not as an action for "injuries to the person of the plaintiff or the person of the testator or intestate of any executor or administrator," within the meaning of the second section cited by us. In that case the carrier lived and the father died before judgment. It was held that damages should be assessed for loss of the child's services up to the date of the father's death, and that all damages for loss of the society or comforts afforded by the child died with the father.

The judgment in this case should be affirmed. The other commissioners concur.

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THE STATE, *Appellant*, v. HONIG.

1. **Larceny: PLEADING, CRIMINAL: JEOFAILS.** An indictment charged the defendant with receiving the goods of one Hale, "before then feloniously stolen, taken and carried away from *another*;" but omitted to give the name of the person from whom they were stolen. *Held*, that as it did not appear that the defendant was prejudiced by the omission, the objection was not well taken after verdict.
2. —— : RECEIVER OF STOLEN GOODS. One cannot at the same time be a principal in a larceny and in the legal sense a receiver of the stolen property.
3. **Practice, Criminal: OPENING AND CONCLUDING ARGUMENTS.** The provision of the Criminal Practice Act that "unless the case be submitted without argument, the counsel for the prosecution shall make the opening argument, the counsel for the defendant shall follow, and the counsel for the prosecution shall conclude," is mandatory. The prosecuting counsel must not be allowed to make the concluding unless he also makes the opening argument.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

D. H. McIntyre, Attorney General, for the State.

Joseph G. Lodge for respondent.

PHILIPS, C.—The respondent was indicted and convicted for receiving stolen property. The following is the indictment :

"The grand jurors of the State of Missouri, within and for the body of the city of St. Louis, now here in court, duly empanelled, sworn and charged, upon their oath present, that Daniel A. Honig, late of the city of St. Louis, on the 20th day of October, in the year of our Lord 1877, at the city of St. Louis aforesaid, with force and arms, \$100 in good and lawful money of the United States of America, of the value of \$100, of the goods, property and chattels of Thomas B. Hale, before then feloniously stolen, taken and carried away from *another*, feloniously did receive and have, he, the said Daniel A. Honig, then and there well knowing

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the said property, goods and chattels to have been so feloniously stolen, taken and carried away as aforesaid, against the peace and dignity of the State, and contrary to the form of the statute in such case made and provided."

The facts in brief are, that the defendant, Honig, had a livery stable in St. Louis and had an organized band of swindlers and thieves in his employ, of which he was chief. Their principal prey was unsuspecting, simple-minded strangers. On this occasion one Hale, from Arkansas, fell into their hands. One of them named Baker told Hale that he had been trying all day to buy a span of horses from one Zumbansen, said to be a "Dutchman," near by, who feigned to be unable to speak English. Honig was present when Baker told Hale he would give him \$10 if he would make the purchase for him. The horses were in fact Honig's, and Zumbansen was in Honig's employ and *particeps criminis* in the transaction. Hale was persuaded to buy the horses at \$150 upon the understanding that Baker would return the money and take the horses. Zumbansen and Hale went into defendant's office in the stable to have defendant's clerk make out the bill of sale and to consummate the purchase. Baker and Honig were at or near the door and manifestly were cognizant of and manipulating the swindle. Baker had bank bills in his hands and assured Hale he would hand the money over to him as soon as he accomplished the sale. Hale had only \$100 and put that down on the desk. He then turned to Baker a few feet off to ascertain his name to put in the bill of sale. On Baker's suggestion that the bill of sale must be made out in Hale's name, the latter's suspicions of fraud were excited, and he turned to get his money. But when he laid the money down on the desk, and this colloquy occurred, Honig appeared at the desk, and the clerk pushed the money over to him and he took it. When Hale turned to get his money it was gone, and he was unable to learn who had it. Honig then told Hale he could have the horses by paying the remaining \$50. This of course was declined, as he did

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not intend to buy the horses for himself and had not in fact, voluntarily parted with his money.

On this state of the evidence the defendant asked the court to instruct the jury to acquit as the evidence did not sustain the indictment, which the court refused.

The respondent did not introduce any testimony on his behalf, and the above was in substance all the evidence in the case.

The court, of its own motion, among others, gave the following instruction to the jury:

"If, from the evidence, you believe and find that the money mentioned in the indictment was by some one, other than the defendant, actually, feloniously stolen, taken and carried away from Thomas B. Hale, with the intent, on the part of the thief, actually to convert it to his own use and make it his property, without the consent of the true owner of said money, that said money was the property of said Hale, and was of the value of \$20 or more; and after it had, by some one other than the defendant, been thus stolen, taken and carried away, the defendant did feloniously take and receive it into his possession, and at the time he did so he knew it to be stolen money, you will find him guilty."

To the giving of this instruction respondent then and there excepted.

After the court had instructed the jury as to the law, the case was not submitted to the jury without argument; but on the contrary, an hour was asked and allowed to each side to argue the case. Mr. E. A. Noonan, assistant circuit attorney, then arose on behalf of the State, and said: "If the court please: Gentlemen of the jury, I will not argue the case on behalf of the State now. Mr. La Due will do that when he comes to close the case. We rely on the evidence to show the guilt of the defendant under the instructions of the court." This was all that was said by any one representing the State in opening the argument. Counsel for defendant then and there took exception to the refusal of the State to open the case, as required by law, in the

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following language: "I take exceptions to the opening, or want of opening, of the argument in this case. It is not such as is contemplated by the statute, and it is in violation of the rights of defendant, which he here claims. I demand that the prosecution shall open the argument as the statute says it shall."

Circuit Attorney La Due.—"We are willing to risk it."

The Court.—"I will not require the State to open the case further."

The jury returned a verdict of guilty, and assessed the punishment at three years in the penitentiary. On appeal to the court of appeals the judgment of the court below was reversed and the cause remanded. Thereupon the State brings the case here by appeal.

As this defendant so justly deserved to be punished for his criminal part in this transaction, it is unfortunate to the public that justice should fail through an improper indictment. But it is of more general importance that one criminal should escape than that the safeguards of legal forms and constituted methods of legal procedure should be broken down and disregarded in his trial.

It is objected to the indictment that it does not give the name of the person from whom the property was stolen.

1. LARCENY: pleading, criminal: jeof-allis. The indictment was evidently carelessly drawn. Its language is "\$100 of the goods, property and chattels of Thos. B. Hale, before then feloniously stolen, taken and carried away from another." It is not apparent that this is a "defect or imperfection" which tended "to the prejudice of the substantial rights of the defendant upon the merits," and the objection is not well taken after verdict.

The court of appeals held in this case, (9 Mo. App. 298,) that one cannot at the same time be "a principal in 2. receiver of stolen goods. the larceny and in the legal sense a receiver of stolen property." With its reasoning I am well satisfied. It is sustained by a great weight of authority. One object in punishing a person as the receiver

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of stolen goods, is to prevent the real thief or taker from getting rid of the visible evidence of his crime by transferring the possession to another, and aiding him thereby in converting the property into another form and lessening the chances of detection. If he is a principal actor in the theft—the actual captor of the property, it is illogical and contradictory to say he has received it from another. In view of the uncontradicted evidence in this case it is remarkable that Honig should have been indicted as the mere receiver of goods stolen by another. He was the organizing, governing and present spirit in the whole scheme and execution. He incited it. He heard and said all that was essential in the plot. He participated in the conversion and as proof conclusive of his actual presence as an aider and abettor at the fact, the moment Hale laid his money down, he appeared within reach to lay his itching fingers on it, as it was shoved across the table by one of his puppets. By all the recognized authorities this made him a joint principal in the theft and in such case "he surely could not be indicted as a receiver." *Regina v. Perkins*, 5 Cox C. C. 554.

The conduct of the prosecuting attorney in refusing to make an opening argument to the jury, is brought to ^{3. PRACTICE, CRIMINAL : opening and closing arguments.} our attention; and though not essential to the determination of this appeal, is an important question in practice. Section 1908, R. S. 1879, declares that "The jury being impanelled and sworn, the trial may proceed in the following order: First, the prosecuting attorney must state the case, and offer the evidence in support of the prosecution; second, the defendant or his counsel may then state his defense and offer evidence in support thereof; third, the parties may then respectively offer rebutting testimony only, unless the court for good reason in furtherance of justice, permit them to offer evidence upon their original case; fourth, the court must instruct the jury in writing, upon all questions of law arising in the case, which are necessary for their information in giving their

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verdict; fifth, unless the case be submitted without argument, the counsel for the prosecution shall make the opening argument, the counsel for the defendant shall follow, and the counsel for the prosecution shall conclude the argument."

This section is new and first enacted in 1879. In thus directing the order of trial, the legislature evidently had some definite object in view. In state trials, the common law rules of proceeding were well settled in practice and understood by bench and bar. In prescribing a definite order it must have been in the legislative mind to remedy some supposed or ascertained defect in the old system, or to regulate some apparent laxity in the observance of ancient methods, or to correct some abuse prevalent somewhere. As the older members of the profession in Missouri will recall, the manner of charging juries in the State at one time was *ore ternus*. The abuse of this method by a certain *nisi prius* judge induced the legislature to enact that the charge should be in writing. And from time to time the legislature, as experience dictated and abuses arose, has prescribed, by positive enactments, rules regulating criminal procedure. It is noticeable that the provision in respect of this manner of charging the jury in criminal trials, is incorporated in said section 1908. No one would say that the requirement that instructions must be in writing is directory and not mandatory. The fifth order of trial is just as mandatory as the fourth. It is further observable in this section that the legislature left some things to the discretion and pleasure of counsel. In the second order of trial "the defendant or his counsel may * * state his defense," but as to the prosecuting attorney, it is prescribed in the first order he "must state the case." In the third order "the parties may offer rebutting testimony." There is no compulsion; and in the fifth order, if the case is argued at all, "the counsel for the prosecution shall make the opening argument." It is mandatory. Employing, as the legislature did in this section, the terms "may," "must"

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and "shall," leave no room for construction. The prosecuting attorney might not be compelled to make an argument in the case, but if he argues it at all, he must open it with an argument.

I think the legislature, in the interest of humanity and fair play, designed by this fifth order of trial, among other things, to correct the very injustice practiced by the counsel in this case. He declined and refused to argue the case for the State in the opening, but reserved his fire for the close, thus leaving defendant's counsel, in a matter of personal liberty, to grope in darkness as to the ultimate theory of the prosecution, or to waste his effort and time in assailing positions not designed by the prosecution to be maintained. The prosecutor, under our system of government, is the representative of the majesty of the State, the guardian of the laws, and he should never forget nor neglect the fact that his sole duty is to secure justice. He represents all the people, the prisoner at the bar as well. It, therefore, comports with the dignity and high responsibility of his office to practice candor and prosecute with open-handed fairness. To secure justice to the accused, to give him the benefit of all that the constitutional guaranty implies in the right to be heard by counsel, the State's attorney should first state his case to the jury, and if he argues it at all, should make an opening argument, so as to open to the defendant the true ground on which he demands his liberty or his life. From the very necessity of the situation it was impossible for the legislature to say how much statement or how much argument should be made. Much necessarily must be left to the sense of public duty and the proper appreciation of what is right and manly on the part of the counsel and the supervisory power and wise discretion, exercised within legal bounds, of the trial judge. Both should observe the statute in its spirit; and with a right disposition on their part cases could rarely occur where this court would feel called upon to interfere under this statute.

The judgment of the court of appeals is affirmed, and

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the judgment of the St. Louis criminal court is reversed and the cause remanded for its action in conformity with this opinion. All concur.

THE STATE V. HOFFMAN, *Appellant.*

1. **Deadly Weapons: PLEADING, CRIMINAL.** Where an indictment charges that accused shot at another with a gun or pistol loaded with powder and leaden balls, or stabbed him with a knife or dagger, it is not necessary that it shall allege that the weapon was a deadly weapon.* Such instruments are recognized by the statute as deadly. It is only when other instruments are used that it is necessary to allege their deadly character.
2. **Assault to Kill: EVIDENCE.** Upon a trial for assault to kill, evidence of all the circumstances connected directly with the assault, showing its character, is competent.
3. _____ : _____. **POWER TO MAKE ARRESTS.** Upon a trial for assault to kill, it appeared that the person assaulted at the time had another under arrest. *Held*, that it was wholly immaterial whether he was an officer authorized to make arrests or not.
4. **Prosecuting Attorney's Remarks.** Certain remarks of the prosecuting attorney complained of as being unsupported by the evidence; *Held*, not open to this objection.
5. **Right of Accused to be Present in Court.** The accused has the right to be present when his motion for new trial is heard. To refuse his counsel's request to have him brought into court for that purpose, is error requiring reversal of a judgment of conviction. SHERWOOD and NORTON, JJ., dissented.

*Appeal from Stoddard Circuit Court.—HON. R. P. OWEN,
Judge.*

REVERSED.

S. M. Chapman for appellant.

D. H. McIntyre, Attorney General, for the State.

HENRY, J.—Defendant was indicted for an assault with

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intent to kill Orson B. Miller, and on a trial of the cause, at the March term, 1882, of the Stoddard circuit court, was found guilty and his punishment assessed at ten years' imprisonment in the penitentiary.

From the judgment he has appealed to this court, and contends that the indictment is defective because it is not 1. **DEADLY WEAPONS:** alleged therein that the pistol "loaded with powder and leaden balls," with which the shooting is charged to have been done, is a deadly weapon. Where the indictment alleges that the accused shot at, or stabbed another, it is not necessary to allege that the gun or pistol, "loaded with powder and leaden balls," or knife or dagger, with which the shooting or stabbing was done, is a deadly weapon. Such instruments are recognized by the statute as deadly, and it is only when the assault is made with other instruments, that it is necessary to allege their deadly character. *State v. Greenhalgh*, 24 Mo. 373.

Orson B. Miller was permitted to testify that he had arrested one Galloway, and that the defendant, while 2. **ASSAULT TO KILL:** evidence. way was in his custody, said to Galloway in response to a remark "let's go," made by Miller to Galloway, "You need not go unless you want to;" that after Miller procured a horse for Galloway, defendant asked permission to speak to Galloway, and, after he had done so, defendant left them, but afterward went into a house where Miller and Galloway were, and asked, "What is the matter," to which Galloway replied: "Oss has my pistol and won't give it up." Defendant then said: "That is my pistol; lay it down where you got it." Miller said: "I took this pistol from Galloway and did not get it from the stable, but, if it is yours, I will give it to you when Galloway gets started, but will not lay it down." Miller and Galloway then started to leave the house, when defendant said: "That is my pistol, and I am going to have it," and thereupon drew his pistol and fired at Miller, the ball taking effect in his side. He fired a second shot which struck Miller in the head.

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The testimony in relation to the arrest of Galloway, and to what was said by defendant prior to the shooting, is objected to as irrelevant. It was a detailed account of the circumstances connected directly with the assault, showing its character, and was competent.

Whether Miller was an officer authorized to make an arrest, is wholly immaterial. Defendant was not indicted for ^{3. — : — : pow-} resisting an officer in the discharge of his _{er to make arrests.} duty, nor was he the party arrested. If Miller had been shot by Galloway, or the defendant had been charged with resisting Miller, as an officer, in the discharge of his duty, the question of his authority to arrest Galloway would be material. This is also an answer to the objection to the testimony of Norrid, who stated that on the day of the shooting, Miller told him he had Galloway under arrest. The fact that he had Galloway in his custody was not controverted, and this evidence could not possibly have prejudiced defendant.

Defendant also complains that the prosecuting attorney stated to the jury in his argument that: "When defendant saw the struggle between Galloway ^{4. PROSECUTING ATTORNEY'S REMARKS.} and Miller, he came to the prisoner's rescue." The facts in evidence formed a very good foundation for such an argument. Certainly it was not such a distortion of the evidence as would justify a reversal of the judgment.

The prosecuting attorney also stated in his closing argument to the jury: "That after defendant had fired the shot that felled Miller to the floor, he jumped out of the back door and fled, leaving Miller weltering in his gore." Defendant's counsel insists that this was a gratuitous statement, unsupported by any evidence in the cause. Norrid testified that defendant "fired on Miller, and, as Miller turned, he fired again, and Miller fell from the shot, and Hoffman ran out of the south door into the field."

The remaining point made by counsel is, that defendant was not present when the court passed upon his motion for

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5. **RIGHT OF ACCUSED TO BE PRESENT IN COURT.** a new trial, although his counsel requested that he be brought into court to be present at the hearing of said motion.

The 22nd section of the Bill of Rights declares that: "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel." If the record only failed to show the presence of the defendant when his motion for new trial was heard and determined, the cases cited by the State's counsel would be in point; but this record shows, not only that he was absent at the argument and final action of the court on the motion, but that the court refused his request, made by his counsel, that he might be present. In the *State v. Underwood*, 57 Mo. 40, the accused was present at the final argument and determination of his motion, and the complaint was, that there had previously been a brief discussion of the points made by his motion for a new trial in his absence. In the *State v. Brown*, 63 Mo. 438, the record did not show the presence of defendant at the hearing of his motion, but no such request as was made in the case at bar was made by Brown, and the court based its opinion upon the provision of the statute: "That no person indicted for a felony can be tried unless he is personally present at the trial," holding: "That the motion for a new trial concedes that a trial of the issues has taken place, * * and is not such a proceeding as is contemplated by the statute or embraced within its terms." The question here presented is a very different question from that which arose in *Brown's case*. The accused demanded his right, under the constitution, to be present, not at the trial in the technical narrow sense of the statute, as construed in the *Brown case*, for the constitution has no such restricted meaning, but to appear and defend throughout the proceeding against him, which is pending in the trial court until the determination of the cause by the rendition of a judgment. If the court could refuse to permit the accused to be present, with equal propriety it could exclude his counsel. The constitution does

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not declare that either may appear, but "that the accused shall have the right to appear and defend in person, and by counsel." He has the right to be there to make suggestions to his counsel, or, if he desire, to argue the motion to the court. It is a constitutional right, but if neither guaranteed by constitution nor by statute so reasonable a request as that of a prisoner on trial for his life or liberty, to be present at any important step in his cause, should be granted.

The judgment is reversed and the cause remanded.
NORTON and SHERWOOD, JJ., dissent.

SHERWOOD, J., DISSENTING.—If no error was committed during the trial of the cause, as the foregoing opinion admits, I am unable to see why the judgment should be reversed. Will it be seriously contended that the defendant, had he been present at the argument of the motion, could have made error appear, when none existed?

BARNES v. McMULLINS, Appellant.

1. **Temporary Judge: CHANGE OF VENUE: IN CIVIL CASES.** Under the act of 1877 in relation to temporary judges (Acts 1877, p. 217; R. S. 1879, §§ 1106 to 1113,) if an affidavit of prejudice was filed against the regular judge in a civil case, and the parties failed to agree upon a substitute, the judge might either order an election of a temporary judge for the trial of the case by the members of the bar present, as provided by that act, or grant a change of venue to another circuit, as provided by Wagner's Statutes, page 1355, sections 1, 2, 3, 4.
2. _____. The above act of 1877 authorizing election of temporary judges in civil cases was constitutional.
3. _____. If a temporary judge elected under that act was disqualified by prejudice, the act provided for holding another election. There was no right to a change of venue.
4. **Counter-claim.** Nothing can be pleaded as a statutory counter-claim that does not constitute a demand against the plaintiff.
5. **Negotiable Paper: TRANSFER AFTER MATURITY: COUNTER-CLAIM:**

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OFFSET. This State, when a negotiable note is indorsed or transferred after maturity, the right of offset or counter-claim on an independent contract does not follow it in the hands of the assignee. We adhere to the English rule that only such equities follow it as arise out of or inhere in it, and that the assignee takes it divested of all rights and claims arising out of independent transactions. See *Cullen v. Cook*, 77 Mo. 388.

6. **Equity Jurisdiction of Cross-demands: GENERAL RULES: INSOLVENCY: NON-RESIDENCE.** The jurisdiction of equity to afford relief in behalf of a cross-demand in a proper case, is of ancient origin. It existed prior to any statute of set-off; and still exists independent of any such statutes. But courts of equity are often enabled by them, on the well-known principle of following the law, to afford more efficient relief and in a greater variety of cases than before the statute.

The relief given depended upon the circumstances of each case, sometimes there would be a decree that the demand of the defendant be applied to the payment and discharge of the demand sued on; sometimes a decree restraining the plaintiff from prosecuting his demand till the defendant had established or failed to establish his cross-demand in a court of law. The moving principle was not so much the inconvenience and circuity of two actions, as the injustice of compelling the defendant to pay the demand against him and take the chances of insolvency of the plaintiff or the plaintiff's assignor. In cases where it was ascertained that the plaintiff was only a nominal owner or assignee without value, the court would decree an offset; but in all such cases there had to be some fact, such as insolvency or non-residence, showing imminent danger of the defendant being compelled to pay without receiving credit for his cross-demand.

7. — : UNLIQUIDATED CROSS-DEMANDS. Whether this jurisdiction may be exercised in favor of cross-demands at law arising *ex contractu*, or of equitable cross-demands, such as the right to a prospective balance in an unsettled partnership, is discussed but not decided. But in no case will it be exercised in favor of an unliquidated cross-demand *ex delicto* in its nature. Compare *Reppy v. Reppy*, 46 Mo. 571.

8. **Statutory Counter-claim: "ACTION ARISING ON CONTRACT."** In determining what may be considered as "an action arising on contract," within the meaning of the second subdivision of section 3522, Revised Statutes 1879, a rather liberal construction has been employed by the courts. All independent express contracts, whether liquidated or unliquidated, are the subject of counter-claim under this subdivision, as a matter of course; and it has been held that in all that class of cases in which a tort has been suffered and the law permits the sufferer to waive the tort and sue upon an implied con-

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tract, if he indicates in his plea that he is proceeding on the implied assumption, his action will be sustained under this subdivision as an action arising on contract.

9. **Case Adjudged.** The cross-demand asserted in the present case being one for fraud and deceit practiced in making and executing a contract of sale, rather than for breach of the contract; *Held*, that it could not be entertained, the plaintiff's action being upon a promissory note having no connection with the contract of sale.
10. **Practice: EXCEPTIONS.** Where the bill of exceptions shows that the appellant declined further to appear or participate in the trial, this court cannot consider objections which purport to have been subsequently taken at the trial.
11. **Promissory Notes: DAMAGES IN LIEU OF PROTEST CHARGES.** The damages allowed by statute in lieu of charges for protest, etc., are to be computed on the principal sum specified in the note, not on the principal and interest.

Appeal from Livingston Circuit Court.—The case was tried before J. M. DAVIS, Esq., sitting as Special Judge.

REVERSED

J. J. Clark for appellant.

C. H. Mansur for respondent.

MARTIN, C.—This was an action on a negotiable promissory note, made by defendant and payable to one Robert J. Pence, in the sum of \$1,236.50, and indorsed by him to plaintiff. The petition was filed on the 26th day of December, 1877.

Before making answer the defendant filed his application for a change of venue, based upon an affidavit that the judge of the court was so prejudiced against him that he could not have a fair trial. When the application came on for hearing, the court overruled it, and ordered the clerk to hold an election for the purpose of electing a special judge to try the case. This order was based upon the affidavit of the defendant, charging him with prejudice. The election was held and resulted in the election of *Sm.th*

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Turner, Esq., a member of the bar. After he took his seat to try the case, the defendant made another application for a change of venue, based upon another affidavit charging prejudice on the part of said Turner. Thereupon Mr. Turner refused to proceed further with the case, and resigned the position to which he had been elected. The judge of the circuit then ordered the clerk to hold another election, which was done, and James M. Davis, Esq., a member of the bar, was elected, and, as the record shows, went on to try the case, after having taken and subscribed the oath required by law. Before the trial began, defendant made another application for a change of venue, based upon another affidavit charging Mr. Davis with prejudice against him. This application was overruled, and the case was ordered to proceed.

The defendant had filed his answer a few days before said election, in which he admitted the execution of the note and denied all the other allegations. It then went on to say that defendant had purchased from said Robert J. Pence, the payee of the note, a stock of goods for the price of \$8,000, and had paid him for them; that before the purchase said Pence represented to defendant that the goods were good and sound, and promised that if they were not sound or came short, in a fair invoice price, of the sum of \$8,000, he would refund to defendant the full amount of whatever the said stock of merchandise fell short of the amount of \$8,000, whether by reason of damage or lack of quantity; that defendant purchased on the faith of said representations and promises; that said Pence caused the goods to be invoiced at a price much above their real value; that said goods fell short by reason of unsound and damaged goods, more than \$3,000, and in quantity more than \$700; that said Pence, although requested, had failed to refund said sum or make defendant whole for the damages sustained; that well knowing defendant's claim the plaintiff had conspired with said Pence to cheat and defraud defendant, and to that end had accepted and received the note in

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suit without consideration, which was indorsed to him long after said Pence had been notified of defendant's demand aforesaid. It is added that said Pence is insolvent and a non-resident, and that defendant will be remediless if compelled to pay the said note; that by reason of the premises defendant has a just and equitable counter-claim against said Pence, of which plaintiff had notice before he became possessed of the note.

That part of the answer containing the equitable counter-claim was on motion stricken out.

A few days afterward an amended answer was filed containing the same matter more specifically pleaded, in which it was alleged that said Pence at the time of the sale well knew the unsound and damaged condition of the goods, and agreed to ship them to Chillicothe and re-imburse defendant for all damaged goods and refund the price of all invoices failing to reach defendant. The counter-claim as thus pleaded was stricken out the second time.

At this stage of the case the defendant, according to his statement and the bill of exceptions, abandoned the case, declining further to appear or participate in the trial, save only to object to the case being tried by the special judge. His objections were overruled and the case proceeded. A jury was sworn and evidence introduced to sustain the issues on the part of plaintiff. The defendant declined to cross-examine witnesses or participate in the trial. A judgment was rendered in favor of plaintiff in the sum of \$1,516.30. The defendant seems to have reappeared in the case and moved for a new trial and in arrest of judgment. I will now consider the material exceptions to the action of the court as presented in the record.

I. It is urged by defendant that the judge of the circuit court had no authority in law to order the election of a temporary judge to try the case.

The 2nd section of the act of the general assembly relating to the election of temporary judges, approved May

1. TEMPORARY JUDGE: change of venue: in civil cases.

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19th, 1877, provides that: "If the judge is interested or related to or shall have been counsel for either party, or when the judge, if in attendance, for any reason, cannot properly preside in any cause or causes pending in such court, and the parties to such cause or causes fail to agree to select one of the attorneys of the court to preside and hold court for the trial of cause or causes, the attorneys of the court who are present, but not less in number than five, may elect one of its number then in attendance, having the qualifications of a circuit judge, to hold the court for the occasion." Sess. Acts 1877, p. 218. The act provides that the election shall be held by the clerk of the court, and that if the person first elected to act as special judge fails or refuses to act, another election shall be held in like manner, from time to time, until a suitable person is chosen, who can and will preside.

The defendant in this case filed his application for a change of venue alleging that the judge was prejudiced, and insists that under the provisions of the statutes relating to change of venue the court had no discretion in the matter, but was required by law to send the case to another circuit. 2 Wag. Stat., p. 1355, §§ 1, 2, 3, 4. The solution of this question involves a construction of the act of 1877, relating to temporary judges, and it is not entirely free from doubt, in my mind.

The statutes in force prior to this act allowed changes of venue on account of the interest, relationship or prejudice of the judge, and undue influence of the opposite party. The filing of the affidavit, without proof at all in support of it, rendered it compulsory upon the judge to stop all further action in the case and send it for trial elsewhere. He had no discretion in the matter when the application was in conformity with the statutes. *Corpenny v. City of Sedalia*, 57 Mo. 85. When the judge was interested in the cause, or was related to either party, or had been of counsel, it was obligatory on him, upon simple motion, to send the cause elsewhere for trial without application on affi-

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davit. And in such cases he had no authority to try it without the consent of both sides. 2 Wag. Stat., 1356, § 5; *Gale v. Michie*, 47 Mo. 326.

It will thus be seen that a formal application upon affidavit for a change of venue on account of prejudice or undue influence, and a simple motion for a change in a case of interest or relationship of the judge, by disqualifying him for trying the case, necessarily furnished the grounds upon which a special judge is authorized to be elected under the act of 1877. The law as it stood prior to the act of 1877, compelled a change of venue when any of those disqualifications occurred. The act of 1877 authorized the election of a temporary judge when the judge had been of counsel, or was interested in the cause, or related to either party, and "when the judge, if in attendance, for any reason cannot properly preside in any cause," and the parties fail to agree upon a special judge. The act does not specifically designate the disqualification rising from prejudice or undue influence, but it provides for an election when the judge is disabled from properly presiding for any reason. When that reason is apparent it is a matter of no consequence whether it is one of the grounds for change of venue or not. The act authorizes an election when the judge cannot preside for any reason. Now when it is spread upon the records that the judge is prejudiced or is subject to undue influence, by the affidavit of the party, which he cannot dispute or disprove, it seems to me his *status* toward the case is fixed. He cannot properly preside, and the election of a special judge is in order. If the election cannot take place except in the specified instances of interest, kinship or relation as counsel, then no effect would be given to the comprehensive term of "any reason." The fact that a change of venue is provided for in the case of prejudice and undue influence, does not militate against this construction of the act, because a change of venue was also given by the statutes when the judge was related to either party or was interested in the cause. Such reasons

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of disqualification are undoubtedly included in the act of 1877. In all cases in which the judge is prevented from properly presiding by reason of disqualifications pertaining to himself, whatever may be their character, the act of 1877 seems to permit the selection of a special judge.

I do not think the court would have erred if a change of venue had been granted upon the formal application of defendant, because the act does not, like the act relating to criminal cases, forbid a change of venue. Sess. Acts 1877, p. 357. The language of the act of 1877 relating to civil cases does not seem to command the selection of a special judge in the place of granting a change of venue. In the 6th section it gives the privilege of selecting the judge to the parties when the disqualification occurs. Upon their failure to agree the clerk is authorized to hold an election. If before an election takes place the judge sees fit to grant a change of venue, I see nothing in the act to prevent him from doing so. If he does not grant the change, and either the parties select a judge, or upon failure to agree, the members of the bar select one, the right to remove the cause by change of venue is in that event superseded and withheld by the act of 1877. I regard this act as an abridgment or restriction upon the right to a change of venue under the statutes. When the disqualification happens, the judge can order a change of venue or he can wait a reasonable length of time for the parties or the members of the bar to elect one. I was under the impression that an order of some kind by the judge officially announcing the fact of disqualification was necessary to justify the clerk in holding an election. But in the case of *Lacy v. Barrett*, 75 Mo. 469, the necessity of such an order is dispensed with as not being called for in the act.

In this case the parties could not agree upon a special judge; the defendant made his disagreement very pronounced by denying the privilege of election to the bar in any event, and denouncing the whole act as unconstitutional. An order reciting the disqualification of the judge and ordering

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an election was made by the circuit court. In the case of *Lacy v. Barrett* the judge was disqualified by reason of having been of counsel in the case. Under the statutes prior to the act of 1877, it was obligatory on him to order a change of venue. Under the act of 1877 he felt authorized to allow an election of a special judge instead of ordering a change, and his action in doing so has been recognized as legal. In that case there was no formal affidavit for change of venue. But under the statutes it was his duty to order a change without one, and that duty was as imperative upon him as in a case of prejudice or undue influence, evidenced by affidavit. He is at liberty in both such cases to order a change of venue or permit the election of a special judge.

This construction of the act of 1877 can work no injustice in view of the fact that it has been in force for six years. It will not nullify judgments and trials which have been held before special judges elected in conformity with its provisions; neither will it affect the action of the judge when he has exercised his discretion of ordering a change of venue, and not waited for an election of a special judge.

II. The power of the legislature to provide for the election of temporary judges in civil cases is hardly open to any question, since the act relating to criminal cases has been held constitutional, and the election in civil cases accepted as valid. Sess. Acts 1877, p. 357; *State v. Daniels*, 66 Mo. 192; *Ex Parte Allen*, 67 Mo. 535; *Lacy v. Barrett*, 75 Mo. 469.

III. The first judge selected having resigned and refused to act, the right to select another is provided for in the act. The right to a change of venue on account of the prejudice of a special judge is not provided for, and does not exist. We do not think this is an open question. *State v. Greenwade*, 72 Mo. 298.

IV. The main point on the merits of this case rises from the action of the court in striking out the counter-claim of the defendant. It is preserved in the bill of ex-

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ception as originally pleaded; and as contained in the amended answer, it appears of record. There is no pretense that this counter-claim relating to the sale of the stock of goods is in any way connected with the note sued on. It relates to an entirely independent transaction between Pence and the defendant, which took place after the execution and delivery of the note, which had a consideration of its own. Hence, the right of action and cross-demand cannot fall within the first subdivision of section 3522 relating to counter-claims. We are thus relieved from the often difficult inquiry as to whether the cross-demand is so connected with the plaintiff's cause of action as to be a fit subject of counter-claim or recoupment, irrespective of its form and character as a cross-demand.

Under the second subdivision the defendant is permitted to plead "in any action arising on contract, any other cause ^{4. COUNTER-CLAIM.} of action arising also on contract and existing at the commencement of the action." The section declares that the counter-claim defined in it must exist in favor of the defendant and against the plaintiff. The counter-claim pleaded in this case was not a demand against Barnes, the plaintiff, nor could any judgment on it be rendered against him. This fact, of itself, is conclusive against the defendant's right of counter-claim, as a legal demand under the statutes. *Holzbauer v. Heine*, 37 Mo. 443; *Spencer v. Babcock*, 22 Barb. 326; *Gleason v. Moen*, 2 Duer 642; *Davidson v. Remington*, 12 How. Pr. 310; *Vassear v. Livingston*, 13 N. Y. 248; *Merrick v. Gordon*, 20 N. Y. 93; *Boyd v. Foote*, 5 Bosw. 110; *Grier v. Hinman*, 9 Mo. App. 213; *Wright v. Jacobs*, 61 Mo. 19.

If the portion of the answer stricken out contains a defense of any description, it must be in equity, as no such

^{5. NEGOTIABLE P.A.} ^{PER: transfer after maturity; counter-claim : set-off.} cross-action or demand could be entertained either at common law or under the statutes.

We are thus confronted with the inquiry as to the relief furnished in equity to a defendant who has a cross-demand, which is good as against the plaintiff's as-

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signor, but cannot be pleaded as a counter-claim at law against the assignee when sole plaintiff. One thing is conceded on all hands, that equity will not afford relief upon the mere existence of such a demand in favor of the defendant. In this State when a negotiable note is indorsed or transferred after maturity, the right of offset or counter-claim on an independent contract does not follow it in the hands of the assignee. We adhere to the English rule that only such equities follow it as arise out of or adhere in it, and that the assignee takes it divested of all rights and claims arising out of independent transactions. *Gullett v. Hoy*, 15 Mo. 399; *Unseld v. Stephenson*, 33 Mo. 161; *Mattoon v. McDaniel*, 34 Mo. 138; *Arnot v. Woodburn*, 35 Mo. 99; *Grier v. Hinman*, 9 Mo. App. 213; *Haeussler v. Greene*, 8 Mo. App. 451.

It may be remarked in passing, that a resort to equity in the allowance of some cross-demands which are good at law as against the assignors of the plaintiff, has been obviated in some states by statutes. For instance, in New York under their code of civil practice, a set-off which was good against the payee of a negotiable note is good against his indorsee if received by him after maturity. Code C. P., § 502; *Weeks v. Prior*, 27 Barb. 79. And in this State we have a provision in the statute of set-off which preserves, as against the assignee of a non-negotiable note, any offset which the defendant may have had against the assignee prior to notice of assignment. R. S. 1879, § 3868. This section, which in its present form appears first in the statute of Set-off in the revision of 1865, embraces the substance of similar provisions contained in the statute on Bonds and Notes from 1835 to 1865. R. S. 1835, p. 105; R. S. 1845, pp. 190, 191, §§ 3, 4; R. S. 1855, p. 322, §§ 3, 4; R. S. 1865, p. 602, § 2; R. S. 1879, § 3868.

Resuming the inquiry as to the defense equity can afford when cross-demands exist in favor of the defendant, which

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6. **EQUITY JURISDICTION OF CROSS-DEMANDS:** general rules: insolvency: non-residence. cannot be asserted at law against the plaintiff in the same case, I may state that the jurisdiction of equity to afford relief in a proper case is of ancient origin, that it existed prior to any statute of offset, and that it exists still independent of such statutes, although very often enabled by such statutes, on its well-known principle of following the law, to afford more efficient relief and in a greater variety of cases than before the statute. Barbour Set-off, (1 Ed.) 189; *Green v. Darling*, 5 Mason 202. The relief given in equity depended upon the circumstances of each case. Sometimes the chancellor would enter up a decree that the demand of the defendant be applied to payment and discharge of the demand sued on. At other times a decree would be entered restraining the plaintiff from prosecuting his demand, until the defendant had established or failed to establish his cross-demand in a court of law. The persuading principle which moved equity in these cases was not so much the inconvenience and circuity of two actions, as the injustice of compelling the defendant to pay the demand against him, and take the uncertain chances of insolvency of plaintiff or the plaintiff's assignor when the defendant called on him with an execution. In some cases equity would decree an offset as if the cross-demands were between the real owners, having ascertained that the plaintiff was only a nominal owner or an assignee without value. But in all such cases there had to be some fact disclosing the imminent danger of the defendant being compelled to pay without receiving credit for his cross-demand. Insolvency or non-residence of the defendant's debtor was generally accepted as a sufficient ground for equitable relief of some kind. *Field v. Oliver*, 43 Mo. 200; *Fulkerson v. Danverport*, 70 Mo. 541; *Howard v. Shores*, 20 Cal. 277; *Hobbs v. Duff*, 23 Cal. 596; *Schieffelin v. Hawkins*, 1 Daly 289; *Vassear v. Livingston*, 13 N. Y. 249; *O'Blenis v. Karing*, 57 N. Y. 649; *Boyd v. Foot*, 5 Bosw. 110; *Wallenstein v. Selzman*, 7 Bush 175.

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V. The insolvency and non-residence of the plaintiff's assignor, and the fact of the assignment without value, sufficiently appear in the defendant's plea, and furnish the proper grounds for equitable interference, provided the demand in behalf of which it is invoked is of such a character as will justify the assistance and aid of a court of equity. It was laid down in the old cases that equity would not interfere in behalf of an unliquidated demand, and the doctrine of equitable interference in the adjustment of cross-demands has been generally recognized as applying only to liquidated claims on contract, some courts going so far as to deny it even in that class of cases, when the debt was not due. *State v. Welsted*, 11 N. J. L. 398; *Bradley v. Angel*, 3 N. Y. 475; *Keep v. Lord*, 2 Duer 78. In *Field v. Oliver*, 43 Mo. 200, Judge Wagner remarks: "A set-off is ordinarily allowed in equity only when the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. 2 Story Eq., § 1436. When the party has a plain redress at law not merely by pleading but by an original suit, a court of chancery will generally refuse to assume jurisdiction, nor will equity take cognizance of a case or extend its jurisdiction to sustain as a set-off a sum so uncertain as to require a jury to be empanelled to liquidate it. But when the demand sought to be set-off is certain and definite, and the insolvency of the adverse party is admitted, the chancellor has jurisdiction to retain the matter and give full and final redress by decreeing a set-off or any other relief consistent and proper in the case. The rule is founded in reason and justice, and will be enforced when a proper case is made out, justifying its application."

I am not aware that this equitable control over cross-demands has ever been invoked in this State in favor of unliquidated legal demands. Cogent reasons readily occur to the mind against an extension of the doctrine. It involves an assessment of damages before the set-off can be decreed. This is an undertaking which equity avoids when-

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ever it can. Then again, the assessment may result in nothing or perhaps a very small sum to be offset against the plaintiff's demand, and the injustice of holding the plaintiff's demand in obeyance for so uncertain an event must often fall on him. Notwithstanding these reasons it may plausibly be argued that as the law now allows unliquidated demands arising on contract to be offset one against the other under the name of counter-claim, equity ought to follow the law, and in cases of insolvency or non-residence of the plaintiff's assignor, furnish relief in like manner as in liquidated cross-demands. When the unliquidated demand of the defendant is of an equitable character, such as the right to a prospective balance in an unsettled partnership, some of the reasons against the exercise of equitable jurisdiction, such as the assessment of damages by a chancellor, are obviously wanting. Whether equity would in this State help the defendant in asserting such a right by way of counter-claim, has been touched upon but not decided.

In *Jones v. Shaw*, 67 Mo. 667, the plaintiff sued two defendants on a promissory note. The two defendants averred in their answer that the plaintiff and one of the defendants had been in a partnership which proved unsuccessful and remained unsettled, and that the defendant copartner had paid more than his share of the losses, and asked that the excess of his payment be set off against the notes sued on. As a counter-claim pleaded in this way it was denied. The court did not concede it to be a demand which equity could assist the defendant in offsetting against his note. Judge HOUGH remarks: "If on account of the insolvency of the plaintiff, or other cause, the court would have been warranted in depriving the plaintiff of his right to a judgment on the note in suit until the copartnership affairs of the plaintiff and the defendant Shaw were settled and determined, or if the right of the defendant Shaw to maintain a suit for the settlement of the copartnership could be deemed to be within the definition of a counter-

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claim, still the defendant cannot complain of the action of the court below. Neither the insolvency of plaintiff nor other ground for equitable relief was alleged, and the defendant Shaw neither stated nor prayed an account of the partnership affairs."

In the disposition of this case it may not be necessary to decide whether equity will or will not interfere in behalf of unliquidated counter-claims arising on contract, either at law or in equity, in like manner as in liquidated contracts. One thing is certain, that it will not interfere in behalf of any cause of action under the second subdivision which does not arise on contract. It would not be following the law, if it extended its aid in behalf of actions of an *ex delicto* character which were wholly independent of the plaintiff's demand. No case of equitable intervention will be found going this far.

VI. Is the action which the defendant asks to have offset in this case an action *ex delicto*, or an action rising on contract?

In determining what may be considered as actions rising on contract, within the meaning of the second subdivision, A STATUTORY COUNTER-CLAIM: "action arising on contract." a rather liberal construction has been employed by the courts. All independent express contracts, whether liquidated or unliquidated, are the subject of counter-claims under this subdivision, as a matter of course. And it has been held that in all that class of cases in which a tort has been suffered, and the law permits the sufferer to waive the tort and sue upon an implied contract, if he indicates in his plea that he is proceeding on the implied assumpsit, his action will be sustained under this subdivision as an action rising on contract. He brings his cross-demand within the meaning and terms of the statute by showing that he has in fact elected to sue in assumpsit. Pomeroy Remedies, § 801. The law requires the defendant, in setting up his counter-claim, to state it with as much precision as if he were asserting it in an independent suit. *Holgate v. Broome*, 8

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Minn. 243. It ought to follow from this that if he desires the advantages accorded to an action *ex contractu* the burden rests on him to disclose that fact, in the averments of his pleading.

In subjecting the defendant's cross-demand to the test which distinguishes actions *ex delicto* from actions *ex contractu*, I think there can be no doubt about its falling within the former class. It seems to me it has all the elements of an action of fraud and deceit. This action is always connected with a contract. 2 Hilliard Torts, (4 Ed.) 73. Fraud or deceit accompanied with damages constitutes the cause of action. In stating it the law does not require the pleader to set forth the contract or any consideration, but simply the fraud or deceit and damages. 1 Hilliard Torts, (4 Ed.) 3.

In the present case the fraud or deceit was connected with a contract of sale, but the action is not for a breach of the contract, but for damages suffered by reason of the false and fraudulent representations of the vendor before and at the time of sale. It is alleged that Pence was owner of a stock of merchandise at Kansas City; the defendant had never seen the goods; that he bought and paid \$8,000 to Pence for the goods which were to be shipped to him at Chillicothe; that Pence well knew the character, condition and quality of the goods; that he falsely represented to defendant that the stock consisted of good and sound articles, consisting of clothing, boots, shoes, hats, caps, etc., and such articles as generally compose a good stock of merchandise; that it would amount, at a fair invoice price, to \$8,000; that defendant believing the said representations to be true and the promises of Pence to be made in good faith, and wholly relying upon the said representations and promises, purchased and paid for them the price aforesaid; that a large portion of said goods consisted of unsound and damaged articles, and fell short by reason of said unsoundness and damaged condition, more than \$3,300 in value; that the stock also fell short in quality about \$700; and that the

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goods were invoiced at about \$1,000 over and above a fair invoice. The cross-demand, as pleaded, contains the false representations, the *scienter* of the vendor to the effect that he knew the goods were unsound; the averment that defendant did not know it to be false, and that he was induced to buy, and did buy and pay for the stock by reason of the fraud practiced upon him, and that he has been greatly damaged. The pleading is rather confusedly drawn, and includes some promissory representations to the effect that Pence would make good all short-comings in respect to the merchandise, whether from unsoundness or falling short in quantity. But these expressions of making good and refunding all losses and damages cannot do away with the case of fraud and deceit so unquestionably pleaded and depended upon by defendant. *Moore v. Noble*, 53 Barb. 425. The intention to deceive is sufficiently contained in the allegation that the representations were falsely made by a person who knew they were false.

The conclusion I have reached is, that the cross-demand of the defendant was not a cause of action arising on contract, and that equity will not, as in legal offsets or possibly in unliquidated actions on contract, interpose its aid in behalf of the defendant when he asserts an action in tort by way of cross-demand when sued upon his promissory note. Therefore, the action of the court in striking out the equitable defense from the amended answer was proper.

After the action of the court in striking out the cross-demand and overruling the application for a change of venue,
10. PRACTICE: except
tions. the defendant seems to have abandoned the case. The bill of exceptions says "whereupon the trial progressed, the defendant declining further to appear or participate in the trial, only to object to any and all proceedings that plaintiff or the said James M. Davis, sitting as special judge, should or might thereafter take or have in the case." Under this state of things I do not think we are called upon to pass upon objections and exceptions appearing in the bill of exceptions, evidently com-

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ing from a party who was not present. Objections must be made and exceptions taken at the time of the action of the court. *City of St. Joseph v. Ensworth*, 65 Mo. 628; *Harrison v. Bartlett*, 51 Mo. 170. And I am unable to understand how the defendant could have objected and excepted after he had ceased to appear or participate in the trial. He will not be allowed the advantage of being absent and the advantage of being present, at one and the same time. In *Tower v. Moore*, 52 Mo. 120, Judge SHERWOOD remarks: "The status of a party in a court must be defined; he ought either to appear and go to trial and accept its incidents and consequences, or else quit the field altogether; he will not be permitted to occupy in this regard an ambiguous attitude, nor by the way attempted by this defendant, to appear, disappear or re-appear whenever he thinks it advantageous to do so."

I may add here that after the cross-demand was stricken out, there was nothing to try but the consideration of the note. The answer admitted its execution and the indorsements which placed the title in plaintiff. If there was a consideration received by defendant for the note, it was immaterial whether the plaintiff gave anything for it or not, so far as the action is concerned which remained in the pleadings. An indorsee for collection or by way of gift may sue in his own name. *Webb v. Morgan*, 14 Mo. 428; *Beattie v. Lett*, 28 Mo. 596. On the evidence and instructions the plaintiff was entitled to a judgment on the note.

VIII. It is objected by defendant that the record shows that the damages of four per centum for protested paper were assessed upon the sum of the principal and interest instead of the principal alone. The amount of the judgment shows that this objection is well taken. The statutes give four per centum of damages "on the principal sum specified" in the bill or note. These damages are in lieu of charges of protest and other charges. 1 R. S. 1879, §§ 539, 546, 547. The plaintiff, on the face of the record, has judg-

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ment for \$8.81 more than he is entitled to. The plaintiff in his brief admits that the protest of the notary was not read to the jury and is not in the record of evidence, and offers to remit the whole of the statutory damages contained in the judgment. He is entitled to an affirmance for the balance in the sum of \$1,458.04. The judgment of the circuit court will, therefore, be reversed, and judgment will be entered here for said amount. PHILIPS, C., concurs; WINSLOW, C., not sitting.

For the reasons given in the foregoing opinion the judgment was reversed, and judgment entered here as directed in said opinion. NORTON, J., absent.

THE STATE v. JONES, *Appellant.*

1. **Murder: INSTRUCTIONS: SELF-DEFENSE.** An instruction to the effect that, if defendant willfully shot and killed the deceased, and seeks to justify such killing on the ground of self-defense, he must establish the same from the whole evidence to the reasonable satisfaction of the jury, *Held*, not to conflict with the doctrine that, if the jury from a review of the whole case have a reasonable doubt of the defendant's guilt, they should acquit.
2. _____ : _____. An instruction, which is substantially given in another, is for that reason properly refused.

Appeal from Randolph Circuit Court.—HON. G. H. BURCKHARTT, Judge.

AFFIRMED.

On behalf of the State, it was testified that defendant, having both hands in his sack-coat pockets, stepped out of a drug store and walked rapidly toward the deceased, who was walking very slowly, holding a tobacco stick in his left hand and his right in his pantaloons pocket. When

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they reached each other and had stopped, deceased was leaning on the tobacco stick and had his right hand in his pantaloons pocket. Defendant said something to deceased, and thereupon shot through his coat pocket. Deceased then jerked his hand out and clutched defendant, who told him to let him loose or he would shoot him through the head again. Deceased called on a witness to come and help him. Defendant told the witness not to come any nearer. Defendant's coat pocket was on fire. After deceased fell, defendant said, "Damn you, you won't bother me any more." Defendant was then appealed to by a witness to come and help the deceased, but looked hard at the witness and said nothing. A loaded pistol was taken from deceased's hind pocket after he was shot. One witness testified that ten or twelve days before the shooting, defendant had related a conversation between himself and another, in which he reported himself as saying, in reply to the other person informing him that there was some talk about defendant's wife and deceased, that, if it was true, deceased would have to smell gunpowder, and, if it was not true, some others would have to smell gunpowder. After the shooting defendant said to the justice of the peace that he was not going to run away, showed no disposition to run off, and came before the justice when sent for. On the way to jail, defendant, when asked why he had killed deceased, replied that he had stood it as long as he could, and would have killed deceased long ago but did not want his blood on his hands.

On behalf of defendant it was testified that deceased said he did not want to take defendant's blood, nor did he want defendant to take his blood, and that these statements had been repeated to defendant. Defendant's general reputation for peace and quietness was proven to be good. Deceased said the day before the killing that he had been criminally intimate with defendant's wife. Defendant, himself, testified that on the morning of the killing, his wife, for the first time, admitted her criminal intimacy with deceased,

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and handed him a bottle, saying that she thought that was the medicine which gave deceased (who was defendant's family physician) his influence over her. The bottle was produced and identified, and a physician testified that from its taste and smell he believed it to be a diluted tincture of cantharides or Spanish flies. Defendant told his wife he could live no longer with her; that he would see deceased, who perhaps would furnish her with the means to take her to her father in Kentucky; that it was nothing more than just that he should do so; that he went to see deceased for this purpose, and knowing that he had a pistol, took one along himself for his protection, and fired in the interview when he saw deceased withdrawing his hand from his pocket.

The State prayed and the court gave the following instructions:

1. If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, at the time and place charged in the indictment, with a pistol, willfully, deliberately, premeditatedly and of his malice aforethought, shot and killed Samuel H. Blair, then they must find him guilty of murder in the first degree, and so state in their verdict and nothing more.

2. If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, at the time and place charged in the indictment, with a pistol, willfully, premeditatedly and of his malice aforethought, (but without deliberation, that is, in a heated state of passion,) shot and killed Samuel H. Blair, then they should find him guilty of murder in the second degree, and assess his punishment at imprisonment in the penitentiary for a term not less than ten years.

3. The word willful, as used in the indictment and in these instructions, means intentionally, that is, not accidentally; deliberately means in a cool state of the blood, that is, not in the heat of passion; premeditated means thought of beforehand for any length of time however

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short; malice in the instructions does not mean hatred or ill-will, as it commonly does, but it means the intentional doing of a wrongful act; heat of passion, as used in these instructions, means a condition of quick anger or sudden injury, engendered by a real or supposed grievance suffered at the time, and in order to reduce the crime from murder in the first to murder in the second degree, the killing must be done upon the instant the provocation is given, before the blood has had time to cool and reason to resume its sway, before the mind has time to consider the character and gravity of the act about to be done, and not from hatred or for pre-existing revenge.

4. If the jury believe from the evidence that the defendant, with a pistol, willfully shot and killed the deceased, as charged in the indictment, then, before such killing can be justified on the ground of self-defense, it must appear to the reasonable satisfaction of the jury from the whole of the evidence that the defendant, at the time of shooting, had reasonable cause to believe, and did believe that the deceased was about then to kill him, (the defendant,) or do him some great bodily harm; and that defendant had reasonable cause to believe, and did believe that there was immediate danger of such design on the part of deceased being accomplished; and that defendant did shoot and kill deceased to prevent such immediate harm to himself, and not to gratify a grudge.

5. If the jury believe from the evidence that defendant sought the deceased and provoked or brought on the difficulty which resulted in the death of the deceased by any unlawful act of his committed at the time, or that defendant, voluntarily and of his own free-will, entered into the difficulty, then there is no self-defense in the case, and the jury cannot acquit on that ground; and in such case it makes no difference how imminent the defendant's real or apparent peril may have become during the conflict. If the jury believe from the evidence that Dr. Blair had reasonable cause to believe that defendant was about to kill

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him or do him great bodily harm, then Blair had the right to arm and defend himself, and if the jury further find from the evidence that defendant, after being informed of the fact that Blair was afraid for his life and had armed himself, voluntarily went to meet Blair and by menacing conversation or conduct alarmed Blair and gave him reasonable cause to believe that he (defendant) was about to kill him (Blair), or do him great bodily harm, and in this way and by these means brought on the difficulty, then defendant was the aggressor, and there is no self-defense in this case.

6. The jury are instructed that the fact that Dr. Blair may have been or had been guilty of adultery with defendant's wife, did not justify defendant in seeking Blair and taking his life. If he did so, defendant cannot be acquitted on that ground. Although the jury may believe from the evidence that Dr. Blair had been guilty of adultery with defendant's wife and that defendant had been informed of the fact, yet, if sufficient time had elapsed, after defendant was made aware of the fact and before the killing, for defendant's blood to cool, then the fact of such adultery neither excuses nor mitigates defendant's crime.

7. Defendant is a proper witness in his own behalf, but the jury may consider the fact that he is the accused person testifying in his own behalf, in determining what weight and credibility they will give to his testimony.

8. The jury are instructed that a reasonable doubt, as used in these instructions, means a substantial doubt of defendant's guilt arising from the evidence, and not a mere possibility of defendant's innocence. The jury are instructed that there is no testimony going to show that Dr. Blair ever administered to defendant's wife any drug or preparation for the purpose of exciting her sexual passions, and any statement made by defendant's wife to that effect cannot be considered by the jury as proof of that fact, but may be considered as proof that defendant was so informed.

9. The court instructs the jury that whilst they may

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take into consideration the previous good character of defendant together with all the other facts and circumstances of the case adduced in evidence, in determining whether or not defendant is guilty of the offense charged in the indictment, yet if from the whole testimony they believe defendant is guilty, then his previous good character neither justifies, mitigates nor excuses the offense.

The defendant asked the court to instruct the jury as follows:

1. The jury may consider the character of defendant for peace and quietude in determining his guilt or innocence of the crime of which he is charged.
2. The law presumes defendant innocent and not guilty, as charged in the indictment, and this presumption of innocence follows him through the entire trial until removed by evidence, and touching every material act necessary to constitute the crime charged.
3. If the jury shall believe from the evidence adduced in the case that defendant had reasonable grounds to apprehend a design on the part of the deceased to commit a felony upon him or to do great bodily harm to defendant, and that there was reasonable cause to apprehend immediate danger of such design being accomplished, and that he killed deceased in order to prevent the accomplishment of such design, then you should acquit defendant on the ground that such homicide is justifiable.
4. In determining whether defendant was justified in acting upon appearances and shooting Blair, the jury may take into consideration any threats that may have been made by Blair against the life of defendant and communicated to defendant prior to the killing, if the jury find that such threats were made and communicated.
5. If the jury find from the evidence that defendant and Dr. Blair entered into a conversation about a matter of trouble between them, and that Blair came within a few feet of defendant with his right hand in his pocket, and that before any design or attempt on the part of defendant

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to do any personal injury to said Blair, he, the said Blair, by his attitude, language, movement, appearance and former communicated threats, furnished defendant reasonable cause to apprehend a design to take his life or do him great bodily harm, and reasonable cause to apprehend immediate danger of the accomplishment of such design, and that defendant then fired the fatal shot to prevent said Blair from accomplishing such design, then the jury must acquit the defendant.

The sixth instruction is quoted in the opinion.

7. It is not necessary, in order to acquit on the ground of self-defense, that the danger under which defendant acted, if he did so act, should have been real or actual, or that such danger should have been impending and about to fall on the defendant; but it is only necessary that defendant had reasonable cause to apprehend that there was immediate danger that a design to commit a felony on him or to do him great bodily harm was about to be accomplished.

8. The burden of proving defendant's guilt continues upon the State from the beginning to the termination of the trial, and that if the jury find that defendant has introduced evidence sufficient to create in the minds of the jury a reasonable doubt of his guilt, they must acquit; but a doubt, to authorize an acquittal, must be a substantial doubt of defendant's guilt, and not a mere possibility of defendant's innocence.

Of the foregoing instructions the court gave those numbered one to six, inclusive, and refused those numbered seven and eight.

Reed & Hall and William Henry for appellant.

D. H. McIntyre, Attorney General, for the State.

SHERWOOD, J.—The defendant, indicted for murder in the first degree, for killing Sam'l H. Blair, was found guilty of murder in the second degree, and his punishment assessed at ten years in the penitentiary. The usual instructions, as

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applicable to the facts of the case, were given on the part of the State, and we have been able to discover nothing objectionable in them, and whatever lack there was in the instructions given for the State was fully supplied by such as were given on behalf of the defendant.

The fourth instruction for the State is certainly not obnoxious, because it told the jury that if the defendant ^{1. MURDER; INSTRUCTIONS: self-defense.} willfully shot and killed the deceased, that in order to be justified on the ground of self-defense, he would have to establish such defense from the whole evidence to the reasonable satisfaction of the jury. If a defendant sets up any defense, it of course belongs to him to establish it to the satisfaction of the jury, in order to succeed on that particular issue, though of course his failure thus to succeed would not authorize his conviction if the jury, from a review of the whole case, had a reasonable doubt of his guilt, and the usual instruction as to such doubt was given. When the State proves that a defendant did the killing, with a deadly weapon, this, without more, under our rulings, makes out a *prima facie* case of murder in the second degree, and any matter of excuse, justification or extenuation of the offense, rests with the accused. Kelley Crim. Law, § 242; *State v. Underwood*, 57 Mo. 40; *State v. Holme*, 54 Mo. 153; 1 Bishop Crim. Prac., §§ 1050, 1066.

In reference to the seventh instruction asked by the defendant, but refused by the court, it was properly refused, ^{2. — : — .} for this reason if no other, that it was substantially given in the sixth instruction given on his behalf, as follows: "That while the right of self-defense does not imply the right of attack, so as to avail the defendant in case he sought and induced a difficulty with the deceased, for the purpose of affording a pretext to wreak his malice, yet if on the occasion of the shooting and death of the deceased, the defendant met the deceased with the design of an amicable arrangement of their affairs, and not of doing bodily harm or injury to the deceased,

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and that without defendant's making any attempt to inflict any such injury or harm, the deceased assumed such attitude or appearance as under the circumstances to furnish defendant reasonable ground to apprehend a design to take his life or do him great bodily harm, and that there was reasonable cause to apprehend immediate danger of such design being accomplished, and that he fired the fatal shot and killed the deceased to prevent him from accomplishing such design, then, under the law, the killing was justifiable, although in fact such appearance was false, and there was in fact neither design to do injury to defendant nor danger of its being done." This instruction is certainly as broad as the defendant could possibly ask, and fully as broad as that authorized by the *State v. Eaton*, 75 Mo. 586.

The case of the *State v. Zumbunsen*, decided last term, shows and is decisive of the immateriality of the statement made by the counsel for the State.

For these reasons we affirm the judgment. All concur, except HENRY, J., dissenting.

RUTLEDGE v. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant.*

1. **Railroads: THEIR DUTY TO FENCE.** A county road ran parallel with and immediately adjoining the right of way of a railroad company, where the latter passed through uninclosed prairie lands. *Held*, that this did not exempt the company from the duty to fence imposed by the 43rd section of the Railroad Law. R. S. 1879, § 809.
2. — : — : ORDINARY CARE. Under this section, a railroad company is not chargeable as an absolute insurer of its fences, but with the exercise of ordinary care, only, in keeping them in repair. Ordinary care, however, is a relative term, to be measured by the nature of the case, the hazard and the situation. In keeping up its fences, the care required of a railroad company is not limited to such as would be used and exercised by an ordinarily careful farmer.

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*Appeal from Shelby Circuit Court.—HON. JOHN T. REDD,
Judge.*

AFFIRMED.

Geo. W. Easley for appellant.

R. P. Giles and King for respondent.

PHILIPS, C.—This is an action for damages for killing cattle by the defendant railroad, based on what is known as the 43rd section. Wag. Stat., art. 2, ch. 37. There were three counts in the petition. It is not necessary to set them out as they are good in form. The answer is a general denial.

On the trial, plaintiffs introduced testimony tending to prove that during the years 1878, 1879 and 1880, plaintiffs were partners and were still such, and were the owners of the stock described in their petition; that all of the stock sued for by plaintiffs in this cause were killed and crippled by defendant at the times set out in plaintiffs' petition, and were of the value therein claimed; that all of said stock were killed and crippled between the corporation line at Clarence station and three miles east of there, Messick crossing, being three miles east of Clarence station, except one head of said stock valued at \$20, which was struck and killed on said Messick public road crossing; that the south line of defendant's fence between said Messick crossing and Clarence station was at the time stated in plaintiffs' petition out of repair, and that there were at each of said times when said stock was injured, several places that stock could have and had gone through and got upon defendant's track, although some ordinary repairs had been made on said fence by defendant, a little before the stock was killed on the 25th day of July, 1879; that defendant's right of way was inclosed from Clarence to Messick's crossing, and plaintiffs' stock and the stock of others grazed on the un-

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inclosed prairie lands south of the defendant's inclosure; that there is a public highway running along adjoining to, located on the unimproved prairie lands and parallel with defendant's right of way on the south side and extending from Messick public road crossing to Clarence station, except that travelers have deviated from a straight line for their own convenience and gone some fifty yards farther south than the road is located in order to get by bad places in the road, but that said public highway south of the track is a county road; that the land south of said public road was uninclosed prairie land, and that there were cultivated fields on the north side of defendant's track.

Whereupon the defendant prayed the court to instruct the jury as follows: "Admitting all of the facts adduced by plaintiffs to be true, the finding must be for defendant." Which instruction the court refused to give. To the action of the court in refusing to give said instruction, defendant at the time excepted.

Defendant then introduced testimony tending to prove that all of the stock sued for in the first and fourth counts of plaintiffs' petition was killed and crippled while on Messick's public road crossing; that its south line of fence had been repaired the evening the stock was killed, sued for in the third count of plaintiffs' petition, but that said stock was inclined to be breachy and had been driven away that evening by defendant's employes; that the fence where the stock got through and which is sued for in plaintiffs' third count had been originally a good and sufficient fence, five feet high, and although it had been out of repair before, yet at the time said stock was killed, it was in places in ordinarily good condition and sufficient to keep out stock if it had not been breachy and inclined to break through. Thomas Mitchell, a witness for defendant, then identified Messick public road crossing and defendant's track as being on the east line of section 23, township 57, range 12. Defendant offered in evidence the order of the county court of Shelby county, establishing and locating a public high-

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way from the town of Clarence, Shelby county, to the east line of section 28, township 57, range 12, which said record was admitted by plaintiffs as being the record and order of the county court of Shelby county. To the introduction of said record in evidence plaintiffs objected, because irrelevant and immaterial, which said objection was by the court overruled. Defendant then read said record and order of said county court in evidence.

It is not deemed essential to set out the instructions given for plaintiffs, as no questions arise on them worthy of discussion. The following instructions were requested by defendant and refused:

1. The court declares the law to be that under the pleadings and evidence plaintiffs cannot recover, and the finding should be for defendant.

2. The court declares the law to be that defendant is not required under section 809, Revised Statutes, to fence its track at a place where there is a public highway running parallel with and adjoining its right of way, and if the stock sued for came upon defendant's track by reason of a failure to fence at such place, they should find for defendant.

3. If the jury believe from the evidence that the stock sued for was struck on defendant's track between the Messick public road crossing and Clarence station, and that in the year 1870 there was a public highway located on a line with the south boundary of defendant's right of way and adjoining and running parallel with said right of way between said Messick crossing and Clarence, then defendant was not bound to fence on the south side of its track between said points, and plaintiffs cannot recover for failure to fence at said place, in this case, and they should find for defendant.

4. If the jury believe from the evidence that the fence, where plaintiffs' stock sued for in the third count of the petition went through and upon defendant's track, was originally a good and sufficient fence four and one-half feet

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high, and that it had been repaired the night before the stock sued for in the third count of plaintiffs' petition were killed, and that defendant exercised ordinary care in keeping said fence in repair, then defendant is not liable for the stock sued for in said third count; and by ordinary care, as used in this instruction, is meant such care as would be used and exercised by an ordinarily careful farmer in keeping up his fences.

The court upon its own motion instructed the jury as follows: Unless the jury find that the defendant's fence west of Messick's crossing and along the south line of its right of way was so far defective as to permit cattle to enter upon its railroad; and unless they further find that the cattle described in the petition, or some one or more of them, did by reason of such defects in said fence, enter upon defendant's railroad, they should find a verdict for defendant upon all the counts in the petition.

The jury found the issues for the plaintiffs, except as to one of the cows killed on the road crossing. The defendant brings the case here on appeal.

I. It is insisted that the court erred in refusing the second and third instructions asked by the defendant. The ^{1. RAILROADS: their} evidence showed that on the south side of "duty to fence." defendant's road-way was "uninclosed prairie lands." Unquestionably then, by the 43rd section of the statute in question, it was the duty of defendant to erect and maintain a good and substantial fence on that side of its road. But defendant claims that inasmuch as a county road had been laid out and used, running parallel with the railroad track, and next to the right of way, its road did not pass "along or adjoining uninclosed prairie lands." This construction of the statute is too extreme. It is contrary to both its letter and spirit. The statute must be construed in reference to the object sought to be attained by the legislature, and language employed must be "understood in its plain, ordinary, popular sense." *Burnam v. Banks*, 45 Mo. 350. The recognized object of this and

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similar statutes is to afford, not only protection to private property, but to the lives and limbs of passengers traveling on the railroad.

As such "uninclosed prairie land" was likely to invite cattle running at large, and their known propensity, amounting to a perversity, to pass on to the railroad track, when grazing near it, it is unreasonable to say that because there is an artificial highway next to the railroad, the duty to fence ceases. The county road is on the prairie land. It does not cease to be "uninclosed prairie land" because a county road runs over it. Suppose it had been a natural water-way, a common creek forty or sixty feet wide, instead of an artificial road-way, would the obligation to fence between it and the railroad-way be removed? This question was expressly decided in *Robinson v. C. & A. R. R. Co.*, 57 Mo. 494. It is true the reasoning of Wagner, J., is criticised in *Walton v. St. Louis, I. M. & S. Ry Co.*, 67 Mo. 56, but I do not understand that its authority is overturned. Both of these cases, in my opinion, are correct, and may well stand together. They afford an illustration of a truth which good practitioners too often overlook, that a principle of law remains the same, but the particular facts of each case may limit the application. Redfield R'y, (5 Ed.) 516, 517; *Tredway v. S. C. & St. P. R. R. Co.*, 43 Iowa 527.

II. The only remaining question raised is the refusal of the court to grant the fourth instruction asked by defendant. The statute makes it the duty ^{2 ____: ____: or.} _{dinary care.} of railroads to erect and maintain good fences. It does not perform its duty to the public by merely erecting a fence. It must keep it up and in repair. It does not, however, become the absolute insurer of the fence. The fence is liable to many casualties, against which no reasonable care and vigilance could guard. A wind storm, a water freshet, a fire, breaching stock or trespassers might destroy it. In such case it would be utterly unreasonable to hold the corporation liable for stock killed which entered through a defect thus occasioned. The law allows reason-

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able time to discover the defect and repair it. In other words, it holds the company to the exercise of due care and no more. *Clardy v. St. Louis, I. M. & S. R'y Co.*, 73 Mo. 576; *Case v. St. Louis & St. F. R. R. Co.*, 75 Mo. 668.

The law deals, as it should, with a railroad in this respect, as with an individual. It exacts of it the exercise of ordinary care. But there is often a misapprehension of the term "ordinary care." It is a relative term. It must necessarily be measured by the nature of the case, the hazard, the situation. It "means simply the caution and vigilance which reasonable and prudent men exercise under like circumstances." Shearman & Redfield Neg., §§ 20, 23; *Cayzer v. Taylor*, 10 Gray 280; Thompson Neg., 2 vol. 982, 983; *Flynn v. Kansas City, St. Jo. & C. B. R. R. Co.*, *ante*, p. 195. Manifestly then the fourth instruction in question ought not to have been given, for it proceeds to tell the jury that "by ordinary care, as used in this instruction, is meant such care as would be used and exercised by an ordinarily careful farmer in keeping up his fences." The duties and situation of a farmer in respect of keeping up his fences, are unlike those of a railroad company. The farmer keeps up his fences as a means of protecting his own premises. He owes no public duty in the matter. He alone can suffer by not having a fence. He may suffer his premises to go unfenced. Stock in going on to his premises incur no peril. He has running to and fro over his farm at a speed of twenty miles an hour, no massive machinery freighted with human life, and destructive to any beast in its pathway. What would be ordinary care in the farmer might be gross negligence in the railroad. The teamster who drives his plodding team over the highway must exercise "ordinary care" to avoid collisions and injury to others on the road. So must the engineer in running his train exercise "ordinary care." But could it be said that the engineer rushing with his terrible engine on two narrow rails, with five hundred human lives suspended on his hands and eyes, should keep no keener or more cease-

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less vigil than the ordinary teamster? The situation is different, the peril and the duty greater. The instruction in the form it was asked, was properly refused.

It may be as well to observe, too, that where the first two injuries occurred, there was no pretense that the fence was in repair. In respect of the occasion of the last injury, the bill of exceptions shows, on defendant's part, that "the fence had been out of repair before, yet at the time said stock was killed, it was in places in ordinarily good condition and sufficient to keep out stock, if it had not been breachy and inclined to break through." This was in effect an admission that along the point in question there were places not in ordinarily good condition; and at its best it was only "in ordinarily good condition." It is not stated to be "a good substantial fence," as required by the statute. The breachy inclination of the stock has nothing to do with this question. If the railroad company complies with the statute, it may, in the absence of other negligence, run over and kill any stock trespassing on its right of way. If it fails to have the statutory fence, it may not kill, even a breachy animal. There was, therefore, scarcely evidence sufficient to justify the fourth instruction. The case seems to have been fairly tried, and, therefore, the judgment of the circuit court is affirmed. All concur.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment of the circuit court is affirmed. HOUGH, C. J., concurs in the result. The case of *Robinson v. R. R. Co.*, 57 Mo. 494, was a suit for single damages.

Gregory v. Chambers.

GREGORY, Appellant, v. CHAMBERS.

1. **Malicious Prosecution: DAMAGES.** In an action for malicious prosecution, the jury, if they find for the plaintiff, may, but they are not bound to allow him counsel fees paid in defending against the prosecution.
2. **This Court will not reverse a judgment because the jury appear to have disregarded evidence.** They may have discredited it.
3. **Leading Questions.** It is no error for the trial court to rule out a question which suggests the answer desired, or calls for the opinion of the witness where the jury should form one themselves from the facts.
4. **Malicious Prosecution: EVIDENCE OF CHARACTER.** In an action for malicious prosecution, evidence of the general bad reputation of the plaintiff is admissible, in mitigation of damages, if not to aid in making out the defense of probable cause.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Bell & Huff and Erskine & Foster for appellant.

Pattison & Crane for respondent.

PHILIPS, C.—Action for malicious prosecution. The petition alleged that the defendant maliciously and without probable cause, caused his arrest under an affidavit lodged in the St. Louis court of criminal correction for embezzlement of \$86.50, the property of defendant; that under the warrant the plaintiff was arrested and confined in jail for one day; that he was brought before the court for trial and prosecuted by defendant; that he was discharged and the prosecution determined. Judgment for \$10,000 damages was prayed for. The answer tendered the general issue. On the trial the bill of exceptions shows the affidavit of Chambers was read, made in "attachment suit before Justice J. C. H. Cunningham." No other affidavit is shown. The warrant for Gregory's arrest was read.

The plaintiff testified that he was in jail twenty-four

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hours; that his wife employed an attorney that cost him \$101. One Reid testified, for plaintiff, that he was at the court of criminal correction at the time the case of Gregory against Chambers was tried; that he prosecuted—examined the witnesses; that Mr. Chambers was present as a witness for the State. The question was then asked witness: "State Mr. Chambers' manner on that occasion; was it vindictive, or otherwise?" This was objected to, and the objection sustained. Witness was also asked: "Are you able to state what was said and done at that trial? If so, go on and give it to the jury." This question was also objected to by the defendant, and excluded by the court. The witness was then asked: "After he gave his testimony, he did what?" Ans. "He took his seat by me, and suggested points all the way through the trial."

Gregory, it seems to have been assumed, was acquitted of the charge in the affidavit; though neither the affidavit nor judgment appears in the bill of exceptions.

On the part of the defendant, Thomas Boyd was sworn, and testified that he and the plaintiff Gregory were both in the employ of defendant Chambers in 1875; that plaintiff was employed to deliver books for Chambers and collect the money for them; that it was witness' business to keep an account of the books taken by plaintiff for delivery, and plaintiff's duty to account to witness each evening for the money received; that plaintiff left Chambers' employ without warning and went to New York, and that when he left he was short in his accounts; that he wrote a letter to Chambers from New York, in which he acknowledged that he had used Chambers very badly, that he wanted to get back to his family, but was afraid of prosecution. Witness stated the contents of this letter, the letter itself being shown to have been lost. The witness was then asked what was plaintiff's reputation in the community previous to 1875. To this plaintiff objected on the ground that it was incompetent, but the court allowed the evidence, and the witness stated that "it was bad." There was considerable other

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testimony to the same effect. Witness also stated, without any objection on plaintiff's part, that on two previous occasions while plaintiff was in Chambers' employ he, plaintiff, failed to account for money—for about \$600 in all; that on the first occasion he was behind \$256 or \$265.

The defendant's testimony tended to show grounds of probable cause for his action and his good faith, and that he had acted on the advice of counsel, etc.

Upon the evidence and the instructions given by the court to the jury, a verdict was rendered in favor of plaintiff, and his damages assessed at \$1. Plaintiff moved for a new trial, which being overruled, he appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed. Thereupon plaintiff appealed to this court.

Among the instructions given on behalf of the plaintiff, is the following: "If the jury find for plaintiff, he will be entitled to recover such damages as the jury believe from the evidence he suffered by reason of the prosecution, and in addition thereto the jury may add such further amount, by way of smart money, as they think from all the circumstances the defendant should be punished with."

The principal error complained of by the plaintiff, the appellant, is, that the jury, in assessing his damages at \$1, disregarded this instruction, inasmuch as <sup>1. MALICIOUS PROSE-
CUTION : damages.</sup> his evidence showed that he had expended \$101 as attorney's fees in securing his release from the prosecution. It may be conceded that under the law as now generally recognized, in the action for malicious prosecution, the jury may award the plaintiff the damages directly sustained by him in the defense of the original suit or prosecution against him, including reasonable counsel fees. *Farlie v. Danks*, 30 Eng. L. & Eq. 115; *Closson v. Staples*, 42 Vt. 209; *Sheldon v. Carpenter*, 4 Comst. 579. But is the rule imperative? Has he such a right to this re-imbursement for counsel fees as to command it of the jury?

In *Bradlaugh v. Edwards*, 11 C. B. (N. S.) 377, Chief Justice Erle discusses this precise question, and his reason-

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ing and conclusion meet my understanding of the law. The evidence in that case showed that plaintiff had expended in his defense over seven pounds, while the jury returned a verdict of one farthing. "Where (says the court) a party has been illegally imprisoned and been put to expense in procuring his discharge, he may very well urge that before the jury as an aggravation, but he has no right to demand to be re-imbursed *ex debito justitiae*. It is in the discretion of the jury to give him such damages as they may consider a sufficient compensation for the wrong the party has sustained, irrespective of any expense he may, perhaps needlessly, have incurred in his defense." The learned judge then observes that in view of the questionable morality of the plaintiff's conduct the jury within their discretion concluded "that the injury he had sustained by the short imprisonment he endured was one for which a large sum ought not to be paid, but, on the contrary, was, in the result, a substantial benefit to the plaintiff, and, therefore, amply compensated by the small sum they have awarded him." Williams, J., page 385, added that the plaintiff "had no more right to receive those expenses than a plaintiff in an action for assault has to recover the amount of the surgeon's bill for dressing his wounds. It is a matter which the jury may take into their consideration, but that is all."

So in *Colyer v. Huff*, 3 Bibb 34, action for slander, damages awarded one cent, the court say: "It is an invariable rule never to grant a new trial for the smallness of the damages, in an action founded upon tort and sounding merely in damages." After observing that the rule as a matter of course does not apply to actions *ex contractu*, nor where the verdict is the result of fraud or misconduct, wherein the new trial is granted, "on account of the extrinsic cause which produced the smallness of the damages, and not account of the smallness of the damages alone," the court pertinently to the argument of plaintiff's counsel in his brief, in the present case, say that "the argument

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which admits the rule but tends to prove its inexpediency or injustice cannot be entitled to weight. We have no authority to alter the established rules of law. We sit here to declare what the law is, and not what it ought to be."

In *Mostin v. Coles*, 7 Hurl. & Nor 872, action for injury to goods, the uncontradicted evidence was that the goods lost amounted to 2 l. The jury returned a verdict for nominal damages. *Held*, no ground for new trial. The court in this case put an apt illustration; the action for injury sustained by a railroad accident where the defense interposed is contributory negligence: "The jury being divided in opinion upon the question, and being unable to agree upon it, might nevertheless succeed in arriving at a unanimous verdict for nominal damages. It seems to me possible to reconcile this verdict as the result of an opinion that although the misconduct of the plaintiff had not occasioned the injury, it had in some way contributed to it." So in this case, there was evidence before the jury from which they might have reasonably inferred that the plaintiff's conduct was not free from fault and reprehension; and while out of leniency they were unwilling to turn him out of court without a salve, they did not feel that the defendant deserved to be muled further than \$1 and the costs. See *Richards v. Ruse*, 24 Eng. L. & Eq. 407.

In the case of *Randle v. P. R. R. Co.*, 65 Mo. 334, HOUGH, J., recognizing no doubt the rule above announced, ^{2. THIS COURT WILL} _{NOT REVERSE A} ^{JUDGMENT.} says: "The verdict of the jury is for many purposes undoubtedly conclusive." Furthermore, no rule of law is more firmly grounded in the practice of this State, than that the jury is the sole judge of the weight of evidence and the credibility of the witnesses. Upon this part of their province no judge is permitted to go. As early as the 4th Mo., in *Bryan v. Wear*, p. 106, where plaintiff in ejectment had offered uncontradicted evidence of his title, this court held it error to instruct that plaintiff had shown a good title, because it in effect told the jury "they must believe the evidence."

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In *McAfee v. Ryan*, 11 Mo. 365, it was held that although there may be nothing in the record to impeach the veracity of a witness who deposes to the fact, and the verdict is directly against his evidence, the verdict would not be disturbed. "There may have been something in his conduct before the jury, or in the relation he bore to the parties, which cannot appear to us." In *Steamboat City of Memphis v. Matthews*, 28 Mo. 248, Napton, J., expressed this rule forcibly: "All the testimony was on one side, but the jury disregarded it, and the circuit court, who heard the witnesses, sanctioned the verdict of the jury. We must infer from this that the circuit court was satisfied with the course of the jury. The credit due to witnesses is a matter peculiarly for a jury." In *Bradford v. Rudolph*, 45 Mo. 426, Wagner, J., said: "The whole merits of the question turned upon issues of fact, and the jury were the proper judges of the evidence, and their verdict is conclusive upon us."

The plaintiff called no one to corroborate his statement as to whether he in fact paid counsel fees. Where was the counsel to whom he paid the money? This inquiry might well have arisen in the minds of the jury. The witness' moral character was assailed before the jury. They perhaps, wholly disregarded him in this matter. How could the judge from the bench coerce their opinion or judgment? I have extended this discussion at length in deference to the pertenacity and ability with which the learned counsel for plaintiff has pressed this question for review.

Appellant's next contention is, that the circuit court erred in not permitting him to prove the conduct or actions of the defendant at the trial when plaintiff was being prosecuted. It is important to ascertain what the exact fact is as a basis for this objection. When the witness Reid was on the stand, plaintiff asked him this question: "State Mr. Chambers' manner on that occasion; was it vindictive or otherwise?" This question was clearly objectionable. It was suggestive of the answer

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desired, and assumed for the determination or opinion of the witness, a matter the jury should draw from the facts. The next question was : "Are you able to state what was said and done at that trial ? If so, go on and give it to the jury." The bill of exceptions shows that the trial in view was one of Gregory against Chambers. What that case was is not disclosed. What connection it had with the prosecution in question is not apparent. And why the court should sit and hear rehearsed on the pending issue, "what was said and done at that trial," passes reason and patience. If the object was to elicit the conduct of the defendant Chambers at the alleged trial of Gregory, plaintiff cannot complain, for further on the witness Reid was asked : "After he gave his testimony he did what ?" Ans. "He took his seat by me, and suggested points all the way through the trial."

It is also assigned for error that the trial court improperly admitted evidence impeaching plaintiff's character.

4. MALICIOUS PROS. Whatever might be said *pro* or *con*, were ~~ECTION: evidence~~ of character. this question *res integra*, this court in *Mil-*

ler v. Brown, 3 Mo. 127, has decided it against the appellant. It does not appear to have since been before this court, and presumptively for the reason that the profession have deemed it settled in this State. It is well supported both by reason and authority. The gravamen of the action is not alone pecuniary loss and wounded feelings, but injury to reputation. And why the general character for honesty, etc., is not as much involved as in slander, is difficult to perceive. Mr. Greenleaf, (§ 55, Ev.) while admitting the rule that wherever the general character of the party is involved it may be assailed, as in case of slander, yet says it is not permissible "in trespass on the case for malicious prosecution." The single authority cited by him in support of the text is *Gregory v. Thomas*, 2 Bibb 282. With great respect I submit that the case is no support for the text. The defendant in that case interposed the special defense of probable cause, and what the court decides is, that under

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such a plea setting out specifically the grounds of suspicion on which the prosecution was instituted, "the evidence, therefore, to support them must be special, and confined to the particular facts put in issue." The trial court had, under the special plea, admitted evidence of other particular charges of thefts, etc., imputed to the plaintiff. That was held to be error. But the court expressly say: "We think the court ought not to have permitted the inquiry to have extended further than to the plaintiff's general character." It is, therefore, an express authority for impeaching the general character.

In *Rodriguez v. Tadmire*, 2 Esp. 721, Lord Kenyon held that proof of plaintiff's bad character might be given; "but particular instances could not be called for." And it is apparent that the failure of some text-writers to observe the distinction between making proof of general bad character and "particular instances," has led them into the blunder of saying that Lord Kenyon's opinion, *supra*, was overruled in *Newsam v. Carr*, 2 Stark. 69. The point decided in this case arose on this state of facts: "In the course of the trial, one of the witnesses was asked, whether he had not searched the plaintiff's house, upon a former occasion, and whether he was not a person of suspicious character." Wood, B., answered that in slander such evidence was admissible to mitigate the damages, "and not to bar the action, and in this case such evidence would afford no proof of probable cause to justify the defendant." This is the whole of that case. The question asked was as to a particular instance and as to the witness' opinion if plaintiff was not a "suspicious character." It did not present the question of general bad character, and all the bench decided was, that it was no proof of probable cause to justify defendant.

I deduce from the great weight of authority the rule to be in this action that while the plaintiff's bad reputation may not generally be put in evidence as proof of probable cause, it may always be received in mitigation of damages.

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Wharton Ev., 1 vol., § 54; *Bacon v. Towne*, 4 Cush. 217; *Fitzgibbon v. Brown*, 43 Me. 170; *Martin v. Hardesty*, 27 Ala. 458; *Bostick v. Rutherford*, 4 Hawks (N. C.) 83; *Israel v. Brooks*, 23 Ill. 575. Some of the cases cited fully sustain the suggestion of the court in *Miller v. Brown*, *supra*, that proof of bad character may be admitted to aid in making out the defense of probable cause.

It is suggested by appellant that the instruction accorded to the defendant, wherein it was declared that the jury "are at liberty to determine from all the facts in evidence, whether plaintiff has shown the existence of both malice and want of probable cause," is in conflict with the one given for plaintiff in which the jury are told that if they "believe from the evidence that the prosecution was without probable cause, they may infer therefrom that it was malicious." In view of the fact that the jury found the issue for the plaintiff, the error, if one at all, produced no injury.

The judgment of the circuit court and of the court of appeals must, therefore, be affirmed. All concur.

THE STATE *ex rel.* TROLL v. HUDSON.

1. **Dramshop Licenses : POLICE POWER: TAXING POWER.** The license fee exacted by the general law regulating dramshops and the amendatory act of March 24th, 1883, (Sess. Acts 1883, p. 86, § 3,) is not a tax. It is a price paid for the privilege of carrying on a business which is detrimental to public morals and which the legislature, in the exercise of the police power, has the right to prohibit altogether. The act, therefore, is not void because it does not conform to the restrictions of sections 1, 3 and 10 of article 10 of the constitution in relation to the exercise of the taxing power.
2. — : CITY OF ST. LOUIS. The act of 1883 is applicable to the city of St. Louis.
3. —. Under the act of 1883 it is the duty of the municipal assembly of the city of St. Louis, and of the county courts of the

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several counties to fix the amount of license fee to be charged under the act within the limits prescribed, and until such action is taken by the municipal assembly or the county court no collector has a right to issue a license to any person as a dramshop keeper.

Mandamus.

PEREMPTORY WRIT REFUSED.

This was an original proceeding in this court to compel the respondent, who was collector of the revenue in the city of St. Louis, to issue to the relator a license to keep a dramshop in said city.

An ordinance of the city enacted in 1881, had imposed a license fee of \$60. On the 2nd day of July, 1883, the relator tendered this amount and demanded a license, but respondent refused to issue it on the ground that the act of the general assembly of March 24th, 1883, was in force in said city, and that under that act he could not accept a less fee than \$250. Section 3 of the act is as follows:

"Upon every such license there shall be levied a tax not less than \$25 nor more than \$200 for State purposes, and not less than \$250 nor more than \$400 for county purposes, for every period of six months; the amount of tax in every instance to be determined by the court granting the license."

Relator denied the validity of this act on the ground that it conflicted with the following sections of article 10 of the State constitution of 1875 :

Section 1. "The taxing power may be exercised by the general assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the general assembly for county and other corporate purposes."

Section 3. "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

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Section 10. "The general assembly shall not impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes; but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Relator insisted that the act violated sections 1 and 3, because the general assembly did not fix the tax for State purposes and make it uniform throughout the State, but only provided that it should be "not less than \$25 nor more than \$200," and left it to the local authorities in the several counties to fix it at any sum within those limits; also, that it violated sections 1 and 10, because instead of leaving it to the local authorities to fix the tax for county purposes the act fixed it between certain limits: "not less than \$250 nor more than \$400," and made it obligatory on the local authorities to levy and collect not less than \$250 for county purposes on every license; also, that the act had no application to the city of St. Louis.

This proceeding was brought to test the questions thus raised.

Louis Gottschalk and Smith & Krauthoff for relator.

Leverett Bell for respondent.

PER CURIAM.—The State has the right, in the exercise of its police power, to prohibit the sale of intoxicating liquors without a license. *Austin v. State*, 10 L. DRAMSHOP LI- CENSES: police pow- Mo. 591; *State v. Lemp*, 16 Mo. 389; *State v. Searcy*, 20 Mo. 489. The license fee exacted by the general law regulating dramshops and the act amendatory thereof, approved March 24th, 1883, is not a tax within the meaning of sections 1, 3 and 10 of article 10 of the constitution, but is a price paid for the privilege of doing a thing, the doing of which the legislature has a right to prohibit altogether. Such laws are regarded "as police regulations, established by the legislature for the prevention of intem-

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perance, pauperism and crime, and for the abatement of nuisances," and are not regarded as an exercise of the taxing power. "Pursuits that are pernicious or detrimental to public morals may be prohibited altogether, or licensed for a compensation to the public." Cooley on Const. Lim., (4 Ed.) p. 727; *Burch v. Mayor, etc.*, 42 Ga. 598; *Bohler v. Schneider*, 49 Ga. 195; *Chilvers v. People*, 11 Mich. 43; *People v. Thurber*, 13 Ill. 554; *East St. Louis v. Trustees of Schools*, 102 Ill. 489; s. c., 40 Am. Rep. 606; and cases cited; *Henry v. State*, 26 Ark. 523; *loc. cit.* 525. It does not follow because the license fee is large, or because it may become a part of the public revenue that it is, therefore, a tax. *State v. Hipp*, 38 Ohio St. 225. Many fines, penalties and forfeitures become a part of the public revenue of the State that are not derived from taxation. The disposition made of the fund derived from the license fees does not necessarily determine the character of such fees. The legislature were evidently of opinion that the taxation of a large license fee would tend to diminish the number of saloons and improve the character of those licensed, and thereby secure to a greater degree compliance with all the regulations and restrictions which the law has thrown about such resorts. We are of opinion, therefore, that the act of March 24th, 1883, is not unconstitutional.

We are further of the opinion that section 5441, as amended by the act of March 24th, 1883, is applicable to ^{2. ——:} city of St. Louis: the city of St. Louis. It was said by the court in the case of the *State ex rel. Attorney General v. McKee*, 69 Mo. 508, decided at the April term, 1879, that a general law with reference to the counties of the State would not apply to the city of St. Louis. But it is provided by section 3126 of the Revised Statutes, which took effect in November, 1879, that "whenever the word 'county' is used in any law general in its character to the whole State, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially

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applicable to such city." We think it was the obvious purpose of the act of March 24th, 1883, to increase the license fee for the sale of intoxicating liquors throughout the State, and it is not, therefore, inconsistent with the evident intent of the act to declare it applicable to the city of St. Louis. Nor is such construction inconsistent with any law specially applicable to the city of St. Louis. The only law on that subject applicable to the city of St. Louis is its charter, which authorizes it to license, tax, regulate or suppress saloons, beer houses, tippling houses, dramshops, etc., but the charter does not fix the amount of the license fee to be required, and the law in question, which limits the amount thereof, is, therefore, not in conflict with the charter, but is consistent with and supplementary thereto. It follows that the ordinance passed in pursuance of the charter fixing the amount of the license fee at \$60 is repealed by the act of 1883, which prescribes a limitation as to the amount to be charged in conflict with said ordinance.

We are further of opinion that under the act of 1883 it is the duty of the municipal assembly of the city of St.

a. — Louis, and of the county courts of the several counties in this State to fix the amount of license fee to be charged under said act within the limits prescribed, and until such action is taken by said municipal assembly, and said county courts, no collector has a right to issue a license to any person as a dramshop keeper. As it does not appear from the agreed statement on which this cause has been submitted, that the municipal assembly has ever fixed the amount of license fee to be charged in the city of St. Louis, the collector has no right to issue a license, and the peremptory writ of mandamus will, therefore, be refused.

Judges NORTON and SHERWOOD did not sit, being absent.

The State v. Hayes.

THE STATE V. HAYES, *Appellant.*

1. **Arson: INDICTMENT.** An indictment for an attempt to commit arson may properly combine in one count what the defendant did, himself, and that which he solicited another to do in making the same attempt.
2. — : — . An indictment for an attempt to commit arson is not bad because it alleges that the defendant is the owner of the house; arson being defined by statute to be the burning of any dwelling house in which there is at the time some human being.
3. **Jurors: HAVING AN OPINION.** A juror said before the trial, that, if defendant was guilty, he ought to be sent up for a year or so. *Held*, not to be an expression of opinion as to defendant's guilt, and standing alone, no ground of challenge for cause: but the attending circumstances, the tone and spirit in which it was said, etc., might make it ground.
4. **Verdict: OATH OF OFFICER IN CHARGE OF JURY.** Although the sheriff was not sworn to keep the jury in some private room and to hold none but the authorized communications with them, as required by the statute, (R. S. 1879, § 1910,) until one and a half hours after their retirement; *Held*, that their verdict was not vitiated thereby, as it also appeared that they retired to "the jury room," and that he was sworn before holding any communication with them and before their verdict was rendered, and that it could not have been affected by any outside influence occasioned by the failure to take the oath.
5. **Soliciting Another to Commit Crime.** The soliciting of another to commit crime is an act toward its commission, although the person solicited does not yield to nor act upon the solicitation.
6. **Attempt to Commit Crime: LOCUS PENITENTIAE.** Defendant having made preparations for burning a building, left his supposed accomplice at the building, saying he would go and get some matches, but did not return, and an hour or so afterward was arrested; *Held*, that his failure to return was not proof that he had abandoned his purpose. Anywhere between the conception of the intent and the overt act toward its commission there is room for penitence, and the law in its beneficence extends the hand of forgiveness. But when the evil intent is supplemented by the requisite act toward its commission, the offense is complete.
7. **Judicial Notice: COAL-OIL.** It is not necessary to aver in an indictment nor to prove at the trial, that coal-oil is inflammable.
8. — : **EVIDENCE: ADMISSIONS.** An affidavit by defendant for a continuance in a criminal case is competent evidence against him of his admissions therein contained, but the State by using the same for such purpose does not concede the truth of the whole affidavit.

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*Appeal from Greene Circuit Court.—Hon. W. F. GEIGER,
Judge.*

AFFIRMED.

Patterson & Barker and Heffernan for appellant.

D. H. McAntyre, Attorney General, for the State.

PHILIPS, C.—The appellant, the defendant below, was indicted and convicted in the Greene circuit court for an attempt to commit arson. The indictment in effect charged that, at Greene county, January 5th 1877, the defendant attempted to fire and burn a dwelling house owned by himself, then occupied by human beings, certain persons named. The indictment with much particularity detailed how, toward the commission of the act, the defendant put and spread coal-oil on the floor of said house, preparatory to his meditated offense, "the said coal-oil being then and there an inflammable oil," with the intent to set fire to said coal-oil, and thereby to set fire to and burn the house; and did then and there solicit, incite, etc., one John McMahan to fire and burn said house; and thereto delivered to said McMahan a can of coal-oil, the same being inflammable, etc., "and a bunch of friction matches, with the purpose and intention," on defendant's part, of having said McMahan throw and pour said coal-oil on said house, and set fire thereto and thereby burn the house—and solicited and incited and commanded said McMahan by means thereof to so fire and burn the same "with the intent then and there, on the part of him, the said Michael Hayes, by means of each and every of the acts aforesaid, so as aforesaid done by him, to then and there unlawfully, maliciously and feloniously commit and perpetrate the arson and crime aforesaid, and that he, the said Michael Hayes, failed in the perpetration of said crime."

There was evidence tending to show preparation by

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the use of coal-oil as charged. It seems that the man McMahan had advised the police of the city of Springfield, where the house was located, of Hayes' designs and solicitations to him to commit the act; and on the evening when it was proposed to execute it, he and defendant were to meet in a certain out-house where the policemen concealed themselves. McMahan and defendant did so meet, and the concealed policemen overheard the conversation between the plotters evidencing the scheme as alleged. The coal-oil can was there, and on McMahan's suggesting that he had no matches, defendant said he would go and get some. He left, but failed to return, but did go to a designated house where he said he would be when the house should be fired, and where the officers that night arrested him.

The court gave the following instructions on behalf of the State:

1. If you find from the evidence that the defendant, Michael Hayes, did, at Greene county, State of Missouri, at any time within three years next before the finding of the indictment in this case, willfully, maliciously and feloniously attempt to set fire to and burn a dwelling house situate in Greene county, (then occupied by the families of F. W. Steffen and V. C. Smith,) and in which said dwelling house there was any human being at the time of such attempt, and that defendant did any act or acts toward the commission of said offense, but failed in the perpetration of said offense, then you will find defendant guilty in manner and form as charged in the indictment, and will assess his punishment at imprisonment in the State penitentiary for any period not less than two years, and for as long a time as you may deem it proper to impose.

2. You are instructed that acts on the part of defendant, to constitute an attempt in this case, must be shown by the evidence to be acts suited and adapted to carry into execution the design and attempt charged in the indictment. But if you find from the evidence that defendant hired, incited or commanded one John McMahan to burn said dwell-

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ing house, and furnished said McMahan with coal-oil for the purpose of burning said house, and gave said McMahan directions how to do such burning, and that defendant at that time intended that said McMahan should set fire to and burn the dwelling house, then and in that case defendant is guilty of an attempt to burn the dwelling house; and if you further find from the evidence that at the time of such attempt any human being was in said dwelling house, you will find defendant guilty as charged in the indictment.

3. If you believe from the evidence that defendant offered McMahan money, and solicited, incited or commanded him to burn the dwelling house, with the intent on the part of said defendant at that time that McMahan should proceed to set fire to and burn the house, and did any act in furtherance of the design, then it can make no difference in arriving at your verdict whether McMahan actually intended to burn the house or not.

5. If the jury believe that defendant, after he was charged with the crime alleged in the indictment, fled from justice, or while under recognizance forfeited the same on account of said charge, such conduct on the part of defendant is evidence to be considered by the jury in determining his guilt or innocence.

7. In determining the guilt or innocence of defendant, you should take into consideration all the facts and circumstances in evidence, the acts, conduct and declarations of defendant, and the motive, if any, he may have had to do, or not to do, the offense charged, as shown by the evidence, and if you find from all the facts and circumstances in evidence that there is no other reasonable conclusion from them than that of the guilt of defendant, you will find him guilty as charged in the indictment.

The court refused the following instructions asked by the defendant :

8. In order to commit an attempt to burn a building through the agency of another, defendant must not only have solicited the man McMahan to do so, but he must

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have furnished McMahan with something calculated to accomplish the burning, and although the jury may believe defendant furnished McMahan with a can of oil, unless it appears from the evidence that the oil was inflammable and calculated to assist in firing the building, the jury must acquit; and the jury are not permitted to presume the oil was inflammable and calculated to facilitate the firing of the building.

10. There is a distinction between civil and criminal cases in respect to the degree or quality of the evidence necessary to justify the jury in finding their verdict for the State. In civil cases it is the duty of the jury to weigh the evidence carefully and find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt; but in criminal trials the party indicted is entitled to the legal presumption in favor of his innocence, and his guilt must be proven, not by a mere preponderance or weight of evidence, as in civil cases, but his guilt must be shown beyond a reasonable doubt.

11. Defendant cannot be found guilty unless you shall be satisfied from the evidence beyond a reasonable doubt that he, himself, attempted to set fire to the house in the indictment mentioned, or that he employed or induced McMahan to set fire to the house, and that McMahan agreed to and intended to set the house on fire, and that he would have done so, had he not been prevented or intercepted in the execution of such intention and design, and that he did some act toward the same beyond a mere preparation. The evidence must be such as to exclude every reasonable theory but of defendant's guilt, and the facts proven must be consistent with and point to defendant's guilt, and must be inconsistent with his innocence.

12. There is no evidence to show that the defendant himself attempted to set fire to the house in the indictment mentioned.

13. Even though you shall find that defendant set his coal-oil can, which did leak, near the door of the store or

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dwelling house in the indictment mentioned, and that he got a can of oil and took the same to a stable on an alley, and then gave it to one McMahan with directions for said McMahan to throw the same against the said house and to set it on fire, and the said McMahan did agree to do so; such acts, if you find them to be true, do not constitute an attempt on the part of the defendant himself to set fire to the building in the indictment mentioned.

14. Even though you should find from the evidence that defendant did employ or induce one John McMahan to set fire to the house in the indictment mentioned, that fact or facts, (should you find such to be true,) is not sufficient of itself to find defendant guilty, but you will have to further find that said McMahan did agree and intend to set fire to the house in the indictment mentioned, and would have done so, had he not been prevented or intercepted in the execution of such intention and design.

15. Before you can find the defendant guilty, you must find from the evidence either of the following facts to be true beyond a reasonable doubt: First, that defendant did himself attempt to set fire to the house in the indictment mentioned, and in such attempt, (if you find he made such,) did some act toward the commission of such offense beyond a mere preparation, and was prevented or intercepted in the execution of the same; or, secondly, that defendant employed or induced McMahan to set fire to the house, and that McMahan did agree to set the house on fire, and that he, said McMahan, intended to fire the house and did some act beyond a mere preparation, and that he would have done so if he had not been prevented or intercepted. Unless you so find, you will find defendant not guilty.

16. The court instructs the jury that under the evidence the State has failed to make a case, and you will return a verdict of not guilty.

I. The first question for our determination is the sufficiency of the indictment. The defendant claims that it

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1. **A R S O N:** ^{indict-} contained two alleged attempts, one in which he alone participated, the other in which he attempted to incite McMahan to the act, and, therefore, the State should have submitted to his motion for an election. We do not think the objection well taken. The statute, (Gen. St., § 1, ch. 207,) provides that: "Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense," etc. The acts charged were but so many preparatory acts, means and agencies employed and sought to be used by the defendant, looking to the one end in view, the burning of the house. Because he procured the coal-oil, or used part of it at the point for the application of the contemplated match, and then sought to employ a supple agent to spread more oil and apply the torch, did not any more constitute distinct offenses than the murderer who twice shoots his victim and then hacks his body. *Commonwealth v. Stafford*, 12 *Cush.* 619; *People v. Davis*, 56 *N. Y.* 100, 101; *State v. Patterson*, 73 *Mo.* 699. The matters alleged were but the acts done "toward the commission of the offense."

II. The indictment is not bad for charging the ownership of the house in the defendant. It distinctly charges 2. —: — that the house at the time was occupied by certain families named, human beings, other than the defendant. The statute, (Gen. St., § 1, p. 783,) denounces the act of burning "any dwelling house, in which there shall be at the time some human being." It was not even necessary to name the person occupying the house. *State v. Aguila*, 14 *Mo.* 130.

III. It is claimed that H. C. Jones, one of the trial jurors, was disqualified. He answered satisfactorily the 3. **J U R O R S:** ^{having} usual questions on the *voir dire* examination. But defendant claims he had in fact expressed an opinion adverse and unfriendly to him, prior to his acceptance as a juryman, which fact was not discovered until after the trial. The proof of this is the affidavit

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of one Henry Eaton, who says that a day or two before the trial Jones stated "that if Michael Hayes was guilty he ought to be sent up a year or so." This can hardly be said to be an expression of opinion as to defendant's guilt. It was only the language of any good citizen, that if the man was guilty he ought to be punished. There is scarcely a trial for murder in the first degree in which jurors on their *voir dire* examination, as to whether or not they have conscientious scruples in finding a verdict of guilty where life may be the penalty, who do not answer that, if the man is guilty he ought to be hung. This is no ground of challenge for cause. Much would depend on the attending circumstances of such a remark; as to the whole conversation, what called it out, as well as the tone and spirit of its utterance. But standing alone, as it does in Eaton's affidavit, it furnished no sufficient ground for a new trial. *State v. Baber*, 74 Mo. 292; *State v. Walton*, 74 Mo. 270.

IV. It is assigned for error that the sheriff was not sworn to keep the jury "together in some private or convenient room or place, and not permit any person to speak or communicate with them nor do so himself, unless by order of the court, and to ask them whether they have agreed upon their verdict," as provided in section 1910, Revised Statutes. The bill of exceptions shows that "the jurors retired to consider of their verdict, to the jury room, and were there one and one-half hours before the sheriff was sworn, but he was sworn before he had any communication with the jury, and before the verdict was rendered." The section of the statute in question was designed to secure the jury against any outside influence, and even that of conversation with the officer in charge. And in a case where this precautionary oath is not administered, the court ought to be well satisfied that no harm resulted therefrom to the prisoner. In the case at bar it does affirmatively appear that, at the conclusion of the argument, "the jurors retired to consider of their verdict to the jury room." This presumably was the proper

<sup>4. VERDICT: oath of
officer in charge of</sup>

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place assigned for their retirement. It also affirmatively appears that the officer "was sworn before he had any communication with the jury, and before the verdict was rendered." So there is nothing to give color to any possible external influence upon the jury, either from access to or from any outside person, or word or sign from the sheriff prior to the injunction placed upon him by the cumulative oath.

In *State v. Upton*, 20 Mo. 397, the rule was established by this court that unless it appeared or could be reasonably inferred that the irregularity in some way affected the verdict of the jury, it was no ground for new trial. There the jury used intoxicating liquor in their retirement. It was held that as it did not appear that it was used to excess, nor supplied from an interested source, it did not vitiate the verdict. This was followed in *State v. West*, 69 Mo. 401, and in *State v. Baber, supra*. In this last case the jury left their room and went through the jail on Sunday. This was reprehensible conduct; but as it did not appear that any person talked to them, or that any improper influence was brought to bear on them, it was held to be insufficient to entitle the defendant to a *venire de novo*. See also *State v. Hart*, 66 Mo. 208, and *State v. Clifton*, 73 Mo. 430. This laxity of conduct in important State trials, should be discouraged and most rigidly scrutinized by the courts; and where there exists any just ground of apprehension of undue exposure or influence, the rule of safety and humanity would require a new hearing.

V. The principal question raised by defendant on the instructions is as to the second and third given for the
5. SOLICITING AN - State, and the refusal of numbers eleven
OTHER TO COMMIT CRIME. and fourteen, asked by defendant. The point made is, that unless McMahan, himself, intended to commit the arson, the defendant could not be held to have done an act toward the commission of the offense in attempting to procure him to so do. There are some English cases, such as the *Queen v. Williams*, 1 Den. (Brit. Cr. Cases) 39, and *Rex v. Carr*, Russ. & Ry. 377, which, from their *syl-*

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labi, give color to this proposition. But it is apparent on examination that these decisions rest on the phraseology of the local statutes. They cannot control the plain letter and meaning of our statute: "Every person who shall attempt to commit an offense, and shall do any act toward the commission of such offense, but shall fail in the perpetration thereof," etc. It is the recognized law of this country that the solicitation of another to commit a crime is an act toward the commission. 1 Bishop Crim. Law, § 767. The evil intent which imparts to the act its criminality, must exist in the mind of the procurer. And how the fact that the party solicited does not acquiesce or share in the wicked intent, exonerates the solicitor, baffles reason.

In *Commonwealth v. Jacobs*, 9 Allen 274, it was held that an indictment might be sustained for soliciting a person to leave the commonwealth for enlisting elsewhere in the military service, although such person was not fit to become a soldier. Gray, J., said: "Whenever the law makes one step toward the accomplishment of an unlawful object with the intent or purpose of accomplishing it, criminal, a person taking the step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that by reason of some act unknown to him at the time of his criminal attempt, it could not be carried into effect in the particular instance."

This section of our statute was copied from the New York statute. In *People v. Bush*, 4 Hill 133, a case on all fours with the one under review, where the prisoner solicited one K. to set fire to a barn, and gave him materials for the purpose, it was held sufficient under an indictment on this statute, to warrant a conviction, though the prisoner did not mean to be present at the commission of the offense, and K. never intended to commit it. *Semble*, that "merely soliciting one to commit a felony, without any other act being done, is sufficient to warrant a conviction." The state of Georgia has a statute taken from that of New

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York. In *Griffin v. State*, 26 Ga. 493, this case in 4th Hill is approved. The prisoner intended to commit larceny by abstracting goods from a store house. He obtained therefor an impression of a key to the door, and arranged with one Jones to effect the entrance and abstract the goods. The court says: "The word 'attempt' ordinarily implies an act, an effort, but this statute uses it as synonymous with 'intent,' for it declares that if a person shall attempt to commit a crime and in such attempt shall do any act toward the commission." It was held that the taking of the impression of the key was "alone sufficient to subject him to the law," and the fact that he intended to accomplish the larceny through Jones made no difference. Jones' intent had nothing to do with the offense of Griffin. *King v. Higgins*, 2 East 5.

The evidence tended to show the preparation by Hayes of the means of arson, the coal-oil, spreading it on the floor, meeting McMahan, soliciting, trying to hire and persuade him, and instructing him how to complete the act up to the very evening of its intended consummation. If believed by the jury as detailed by the witnesses, it made out the offense under the statute and sustained the indictment.

VI. Counsel suggest with ingenuity that the defendant should be accorded his *locus penitentiae*. This, for the reason that on the final interview between him and McMahan when, apparently, all that remained to give the building to the flames was a match, he seemingly went off to get one, but did not return. In an hour or so afterward he was arrested. Counsel claim that it was reasonable to infer his repentance and recantation. Anywhere between the conception of the intent and the overt act toward its commission, there is room for repentance; and the law in its beneficence extends the hand of forgiveness. But when the evil intent is supplemented by the requisite act toward its commission, the statutory offense is completed. "A crime once committed may

6. ATTEMPT TO COMMIT CRIME: LOCUS PENITENTIAE.

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be pardoned, but it cannot be obliterated by repentance." 1 Bishop Crim. Law, § 732. If the defendant did not return because he recanted, or because in fact he never entertained the design to destroy the house, why did he not evidence this by returning to his tempted agent and call him off? How did he know but the villain whom he had left there in the darkness, under the powerful incentive of avarice and want, lacking only a match to secure his reward, would obtain one and consummate his contract in the conflagration?

VII. The question was raised in an instruction, and is urged here, that there was no evidence before the jury to sustain the allegation of the indictment
7. JUDICIAL NOTICE: coal-oil. that the coal-oil was inflammable. It was not necessary to aver that coal-oil is inflammable or to prove it. Courts and juries will take cognizance of such matters as are of common knowledge, and pertain to the affairs and experience of almost every man's daily life. Courts do not require proof that fire will burn, or powder explode, or gas illuminate, or that many other processes in nature and art produce certain known effects. 1 Greenleaf Ev., § 56; *Brown v. Piper*, 91 U. S. 37; *Udderzook's case*, 76 Pa. St. 340; *Garth v. Caldwell*, 72 Mo. 622; *Nagel v. Mo. Pac. Ry Co.*, 75 Mo. 665, 666.

VIII. On the trial the State's attorney read in evidence, against defendant's objection, two applications previously made by defendant for continuance,
8. _____ : evidence admissions. in which, he in effect admitted that he did tempt the man McMahan to fire the building; but alleged in explanation thereof, that he suspected that McMahan was of bad character and tempted him to the commission of said crime to test his integrity; and that he had informed certain parties of his suspicions, and let them into his plan to entrap McMahan. He sought and obtained a continuance to enable him to procure the testimony of said witnesses. But they were never produced. Evidently the State introduced the affidavits as admissions on defendant's

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part of the fact that he did solicit McMahan to commit the act. But defendant claims that this course on the part of the State should be treated as if he had been made a witness by the State, and, therefore, it was bound to accept as true the whole of his statement, and could not impeach a witness whom itself had introduced to the jury. This is an evident misapplication of the rule invoked. The affidavits were introduced as admissions of the party defendant. They were competent for such purpose. *Gould v. Trowbridge*, 32 Mo. 292, 294.

It is always competent for the one party to put in evidence the admissions of the adverse party; but such admissions are not conclusive against him. He may explain them. And the jury are to determine what weight is to be attached to them. *Cafferatta v. Cafferatta*, 23 Mo. 235. It is equally true that the party against whom the admission is introduced, is entitled to have the whole of the statement accompanying and explaining the admission go to the jury. *State v. Martin*, 28 Mo. 530. But his whole statement going before the jury, they are the sole judges of its weight and purport; and are at liberty to credit that part which inculpates the prisoner, and to discredit that which exculpates him. This is the well settled rule of this court. *Green v. State*, 13 Mo. 382; *State v. Carlisle*, 57 Mo. 102, 106; *State v. Hill*, 65 Mo. 84; *State v. Napier*, 65 Mo. 462. Presumably it was in reference to this evidence that defendant asked the following instruction numbered nine: "The court instructs the jury that when a party introduces testimony he thereby vouches for the truthfulness of such testimony." And from its being objectionable on account of its abstract form, it was improper as applied to the facts of the case, and, therefore, was properly refused.

There are other minor matters brought to our attention by defendant's counsel, evidencing his zeal and ability. We have fully considered them. They show no error, and contain no principle of law needful of re-examination.

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The probative force of the evidence and the credibility of the witnesses, were matters, under the circumstances of this case, peculiarly within the province of the jury.

We find no error of law in the record, of any moment. The judgment of the circuit court is, therefore, affirmed. All concur.

PHELPS v. WALThER *et al.*, Appellants.

Married Woman, Abandoned by Husband, may sue alone. A married woman may sue as a *femme sole*, in all cases where her husband has abandoned or deserted her, and taken up his abode in another state or jurisdiction. This was the rule of the common law, and the statute has not changed it. 2 Wag. Stat., 1001, § 8; R. S. 1879, § 3468.

Appeal from Cole Circuit Court.—Hon. E. L. EDWARDS,
Judge.

AFFIRMED.

Belch & Silver for appellants.

White & Lumpkin for respondent.

MARTIN, C.—On the 12th day of November, 1878, the plaintiff brought suit against the defendants for a trespass upon her premises in her actual possession and occupation, wherein she alleges that defendants wrongfully entered upon said premises and into the dwelling and out-buildings thereof, and took from her possession and control 210 bushels of wheat; locked up all of her out-houses containing her farming utensils and thirty bushels of shelled oats; prevented her from selling her wheat or sowing her land with it; prevented her from selling or using her corn in the field; by reason whereof she was damaged in the sum

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of \$500, for which she asks judgment. In answer to this suit, the defendants filed a general denial, and in addition averred that the plaintiff was a married woman and as such has no cause of action against them. To this special defense the plaintiff replied, admitting that she was a married woman, and averring that the suit was for and on account of her separate property, and that her husband "before the commencement of this suit abandoned her, and separated himself from her, and still is separated from her, and is away from her, residing outside of this State, and has become a non-resident of this State ever since his said separation from her, and she has no means of procuring him to join with her in this action."

At the trial the plaintiff gave evidence tending to prove all the issues on her part, at the close of which the defendants interposed a demurrer to the evidence, which was overruled. The defendants then submitted evidence tending to prove the issues on their part. At the termination of the evidence, the court, at the instance of plaintiff and of its own motion, gave an instruction bearing upon the right of the plaintiff to sue as a *femme sole*, to the following effect: "The jury are instructed that if they believe from the evidence that plaintiff was, at the time of the institution of this action, a married woman, and has continued to be a married woman since its institution, then the plaintiff has no legal capacity to sue, and they will find for defendant, unless the jury further find that said Phelps had abandoned his wife and left the State." As the principal question in the case concerns the validity of this instruction, the other instructions relating to the trespass need not be set out in full. The jury returned a verdict in favor of plaintiff for \$166.50, from which defendants have appealed to this court.

I. It was a general rule at common law that the husband of a married woman had to join with her in all actions prosecuted in her behalf. But this rule had a few exceptions as well recognized and established at common law as the rule itself. Lord Coke in his *commentaries* remarks:

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"A wife is disabled to sue without her husband as much as a monke is without his sovereign. And yet we read in books that in some cases a wife has had abilitie to sue and be sued without her husband, for the wife of Sir Robert Belknap, one of the justices of the court of common pleas, who was exiled or banished beyond sea, did sue a writ in her own name without her husband, he being alive." Co. Litt. 132. This case of the wife of Sir Robert Belknap is reported in the reign of Henry the Fourth. Lord Coke informs us that he made search for a precedent to warrant the case, and ascertained that a similar judgment had been rendered in the reign of Edward the First, in the case of the wife of Thomas Weyland, who had been abjured the realm for felony, from which, he adds, "it plainly appeareth, that this opinion, concerning the ability of the wife of a man abjured or banished was not first hatched by the judges in Henry the Fourth's time." Co. Litt. 133. Conceding the exceptions, he states it as follows: "And so it is, if by act of parliament the husband be attainted of treason or felony, and saving his life is banished forever, as Belknap was, this is a civil death, and the wife may sue as a *femme sole*." Co. Litt. 133. He seems to confine the exception to persons banished forever. But the cases in Viner's Abridgment support the exception in cases of exile or banishment for a limited time, and also where he was an alien beyond sea. 4 Viner Abr., 151, 152. Blackstone records the exception: "There is indeed, one case where the wife shall sue and be sued as a *femme sole*, viz: where the husband has abjured the realm or is banished, for then he is dead in law; and the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy or could make no defense at all." 1 Blackstone Com., 443. An abjuration of the realm was equivalent in some respects to a divorce between husband and wife, (Co. Litt. 133,) remitting her to the rights and liabilities of a *femme sole*.

II. Of course this long established exception to the rule of joinder in actions by married women, could not be

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literally applied in this country under the same conditions in which it originated and was recognized in England. No abjuration or exile from our territory is known to our laws —certainly not under civil rule. It was not these things, but the effect of these things, which gave rise to the exception in England. Now, it is evident that so far as the rights and liabilities of the wife are concerned, she is left substantially in the same condition, when her husband voluntarily deserts her and takes up his abode in another state or jurisdiction, as if he had been sent there by either legislative or judicial banishment. Accordingly the exception has been applied in this country in all cases in which the husband has abandoned or deserted his wife and accepted an abode or residence in another state or jurisdiction. *Abbot v. Bayley*, 6 Pick. 89; *Gregory v. Peirce*, 4 Met. 478; *Gregory v. Paul*, 15 Mass. 31; *Beane v. Morgan*, 4 McCord 148; *Rhea v. Rhenner*, 1 Pet. 100; *Cornwall v. Hoyt*, 7 Conn. 427; *Clark v. Valentine*, 41 Ga. 143; *Love v. Moynihan*, 16 Ill. 277; *Roland v. Logan*, 18 Ala. 307; *Osborn v. Nelson*, 59 Barb. 375. In the application of this exception the states are regarded as foreign and separate jurisdictions.

III. The doctrine of this exception has been accepted and approved in this State from a very early date. *Rose v. Bates*, 12 Mo. 33; *Zallagher v. Delargy*, 57 Mo. 37; *Musick v. Dodson*, 76 Mo. 624; *Danner v. Berthold*, 11 Mo. App. 351. The case of *Chouteau v. Merry*, 3 Mo. 254, is an authority somewhat in conflict with the doctrine, but it does not seem to have been cited or recognized as such by either court or counsel in any of the subsequent cases which have established the exception in this State beyond all question.

IV. But it is maintained by the counsel for appellant, in an able and ingenious brief, that whatever may have been the rule in this State at common law, it has been modified and changed by our Practice Act, which reads as follows: "When a married woman is a party, her husband must be joined with her in all actions except those in which

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the husband is plaintiff only and the wife defendant only, or the wife plaintiff and the husband defendant; and in all such actions where the husband is plaintiff and the wife defendant, or the wife plaintiff and the husband defendant, it shall be lawful for the wife to sue or defend by her agent or attorney, as she may think proper, and in all actions by husband and wife, or against husband and wife, they may prosecute the same by attorney, or they, or either, may defend by attorney; but it shall not be necessary for the wife in any such case to sue with her husband by next friend, or to appear and defend by next friend." 2 Wag. St., 1001, § 8.

It is argued that by virtue of this section the husband must be joined with the wife in all cases in which she is plaintiff, except when she sues her husband. It is contended that the legislature having enacted a general rule and marked an exception to it, impliedly repealed all other exceptions, and forbade the courts to engrave any others upon it. There is an apparent plausibility in this argument, which perhaps derives some support from the form and language of the provision, which first appeared in our Session Acts in 1868. But when we come to interpret it, as we must, in the light of the common and statute law theretofore existing, its true meaning and import will not be found in such a construction. The provision in our Practice Act which this section took the place of, reads as follows: "When a married woman is a party her husband must be joined with her, except that: First, when the action concerns her separate property, she may sue and be sued alone; second, when an action is between herself and her husband, she may sue and be sued alone. But when her husband cannot be joined with her, as herein provided, she shall prosecute or defend by her next friend." This provision came in with our new Practice Act, and will be found in the revision of 1855. R. S. 1855, p. 1018, § 7. It will be observed that the act of 1868 under which this suit was brought, and which appears in our present revision of

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1879, embraces in substance the provision of 1855, without the exception relating to her separate property, and without the words requiring her to sue or appear by next friend, but enabling her to appear and defend by attorney in like manner as a *femme sole*. 1 R. S. 1879, § 3468.

What this section of 1868 declares about the joinder of the husband is in effect nothing more than the general rule of the common law, which required the husband to be joined with the wife as plaintiff, when she prosecuted a suit in her own behalf. But of course this rule could not apply to a case in which the suit was against the husband by the wife. To require him to join in such a case would have been equivalent to denying her the right to sue him at all; for it is not reasonable to suppose he would consent to a *bona fide* suit against himself, or that he could assist her in such a prosecution. No cultivated system of jurisprudence could tolerate the absurdity of a man suing himself. If there was no allusion at all to suits between husband and wife, the general rule of joinder as sanctioned by this section would not apply to suits between husband and wife. Indeed the previous provision in the revision of 1855 recognized expressly that the husband could not "be joined with her" in such actions. What, therefore, appears in form to be an exception to the general rule of joinder, is in reality no exception at all to that rule. It never did apply to suits between husband and wife, and it never could apply to such cases at law or in equity. It was unnecessary, therefore, to mention them as an exception to a rule which never covered and never could cover them without rendering them impossible.

The object of the section in mentioning suits between wife and husband was not to enact an exception in this respect to the general rule of joinder, which was unnecessary, but to recognize a distinct class of cases to which the rule never did and never could apply, and to enable the wife in such cases to sue and appear by attorney or agent instead of next friend, as in the revisions of 1855 and 1865.

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The section, as it now stands, enacts the general rule of the common law relating to the joinder of husband with wife, and enacts no exception at all to that rule. As to the cases covered by the general rule, it is silent as to those excepted by the common law, as where the husband has deserted his wife and become a non-resident. There being no allusion to this exception and no enactment of any other exception, the argument that the exception in controversy has been impliedly repealed, falls to the ground. The general rule of joinder is restored as it existed at common law, when the suit of *Rose v. Bates* was commenced in 1842, and the exception which then existed as certainly as the rule itself is not repealed either expressly or impliedly. Indeed, the necessity and justice of the exception constitute an unanswerable argument against any repeal or abrogation of it by implication alone. It is unreasonable to presume that the legislature by restoring the general rule of justice, as it existed at common law, intended to deny the remedy and redress of a beneficent exception equally well established at common law. Surely the law will not withdraw its protection from a deserted wife for no other reason than that her husband has abandoned her and will not come into court with her to ask for redress! The very helplessness of her condition ought to lend favor and puissance to her cause.

V. I will be pardoned for referring in this connection to a construction placed upon our statute of conveyances which goes strongly to support the exception to our Practice Act, upheld by us in this case. It is provided in sections 669, 670, that a married woman can convey her real estate by joining with her husband in the deed or power of attorney containing the conveyance. 1 R. S. 1879, §§ 669, 670. This is in the nature of an enabling statute, and no exception is mentioned or intimated. Yet it has been held that a married woman whose husband was an alien residing in a foreign country, could make a deed without joining with her husband in the act. *Zallagher v. Delargy*, 57 Mo. 37.

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This exception has been regarded and treated in the cases as resting upon the same grounds which support the exception allowing her to sue without joining her husband when he has abandoned her, and is outside of the jurisdiction. *Musick v. Dodson, supra*; 16 Cent. L. J. 229.

VI. I do not deem it necessary in this case to review the instructions relating to the trespass in detail. The judgment is so moderate that I am satisfied they placed the issues fairly before the jury.

The plaintiff has filed during pendency of this appeal, a copy of a record showing that since the judgment below she has obtained a decree of divorce. In view of what we have decided it is unnecessary for us to consider the retrospective effect of this decree upon the case. It will make it safe for the defendants to pay the judgment recovered against them.

The judgment is affirmed. WINSLOW, C., concurs; PHILIPS, C., absent.

THE STATE v. THOMAS, *Appellant.*

1. **Weight of Evidence.** Where proper instructions are given this court will not reverse a judgment because it may think that under the evidence a different verdict might well have been rendered; that is a matter for the jury.
2. **Evidence of Character:** PRACTICE. In a case where the testimony is very conflicting, it is a fatal error to permit evidence to be introduced in support of the character of a witness, whose character has not been attacked.
3. **Murder.** The court approves a series of instructions as to murder.

*Appeal from Iron Circuit Court.—Hon. JOHN L. THOMAS,
Judge.*

REVERSED.

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Indictment of Edward Thomas, for the murder of Nicholas Joos.

Ellis Lassater, a witness for the State, testified: I was present when Joos was killed at Middlebrook. I was on the Widow Seitz's porch thirty or forty yards away at first; saw Edward Thomas make a motion with his hands toward Joos' mouth. Joos got up. No blows passed then. They had their hands up. I then went there. They clinched and fell, and rolled down hill ten or fifteen steps, first one on top, then the other. When I came to them Joos was on top and rolled off. Ed. got up. I pulled him off. Joos didn't do anything, but lay on his back with his hands stretched out on the ground. Ed. struck him on his head two or three times with his fist, and knocked him in the mouth, stamped him in the mouth with his boots. I didn't see him stab Joos; but I know he was stabbed; didn't see a knife when I took him away from Joos; saw no wounds at that time; only his mouth was mashed in and bruised; he was lying on his back; he breathed a little and was dead in a short time. I didn't examine his body further at that time. Two or three minutes after the difficulty Ed. got on his horse and started back toward where Joos was lying. I caught his horse by the bridle-rein and stopped him. He then had a knife, but didn't say anything about deceased. He said to me: "If you don't let loose my horse, I'll kill you, God damn you." Deceased was struck with the knife in the left breast.

Charles Seitz testified: I saw Edward Thomas knock a cigar out of Joos' mouth with his finger. Joos got mad. Then they had a few words. Ed. pulled off his coat, and struck first with his fist. Joos struck back. They clinched near the top of the hill in front of Michael Seitz's saloon, staggered and rolled down the hill, quick, Joos on top. I took a seven inch dirk out of Ed.'s hand. William Warren wanted it and I gave it to him. Ed. did not seem to be mad at first. They were talking and joking together

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before Ed. slapped the cigar out of his mouth. I don't recollect of Ed. apologizing and offering him another cigar. I was close enough and think I could have heard and seen if it had been done.

Herman Held: I saw Joos and Thomas come into the saloon and drink together, but did not see how the difficulty commenced. I was twenty steps off. I saw them clinch and roll down the hill together. At last Ed. got on top, and at the foot of the hill, took hold of Joos' chin-whiskers and struck him two or three times with his boot. Joos did not hit Ed. but raised as if to strike, tried to strike, but was unable. Ed. pulled him by the whiskers and struck him in the face. I didn't hear either say anything. Joos was lying on his back and seemed to be senseless when Ed. struck him. He didn't resist. I went up in three or four minutes; he was nearly dead, had a knife wound in the breast. I didn't see Thomas have a knife, he struck with his fist; didn't see Joos have any weapon, or try to use one. It was Sunday afternoon between four and five o'clock, June 15th, 1879. Joos was a pretty good sized man, much larger than defendant.

Edward Seitz: Thomas knocked cigar out of Joos' mouth; then he struck first and Joos struck back. Then Ed. drew a knife and struck with it; got it out of his hip-pocket and struck Joos in the breast, a down stroke. They clinched and rolled down the hill. There I took the knife from Thomas and handed it to Charles Seitz and Warren took it from Charles. After the knife was taken from Thomas he hit Joos in the mouth. Joos' teeth were all broken. When Thomas kicked him he was already out of wind, lying on his back, almost dead. Didn't see Thomas do anything else except having a fuss with Lassater; didn't see Joos have any weapon; he didn't use any. Before the fight we were all sitting on the porch of the saloon, and were friendly and in a good humor. Ed. and Joos had an argument; they were quarreling, not talking loud; then they got in the difficulty. I don't know Joos offered to

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fight Thomas. I didn't pay much attention. I wasn't much drunk.

Doctor Tom. R. Golding testified to having made the post-mortem examination and described the wound. Witness said: It was about one inch wide in the heart. That man wouldn't live two seconds after receiving that wound. It was instant death. They must have been some distance apart, probably a foot, when it was given. I discovered no other wound or bruise, no appearance of being stamped in the mouth. If this man had received the wound where the fight began they could not have rolled down the hill; he hadn't any power after that wound. A blow knocking out the teeth after death would not cause discoloration of the skin, but it would cut the lip.

Wm. J. T. Warren for defendant: Joos was standing, Thomas sitting on the steps. Thomas tipped the cigar Joos was smoking, on which there was at least an inch of ashes. Joos did not seem to take it as an insult; he went off, was gone five minutes; when he came back, he was mad; went close to Thomas, who said "Go away from here; I don't want any trouble with you." I said: "Let's have no fussing here; let's have a good time" Joos stood there, went off ten steps, whirled around and came back and took a hold of Thomas by the left shoulder. I said to Joos "Ain't you my friend?" He said "Yes," but held Thomas and crowded him back on the steps. Thomas raised himself. Joos then threw him on the ground; he got up and they clinched and rolled down hill. Joos got on top. I did not know what to do. Thomas got his knife out. Joos saw it and pressed his arm back against the ground. I set my foot on Thomas' arm and tried to pull Joos off. I don't know how, but somebody pulled my foot off; finally the man was struck. Knife was not drawn until after Joos had him down at the foot of the hill. After I stepped on Thomas' hand, Joos let his arm loose, and grabbed his throat with his left hand and struck with his right hand. Joos was sixty pounds heavier than Thomas, large but not

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very fleshy, could handle Thomas easily and did so, could have beat him to death. The distance from the saloon, where the fight occurred, to the Widow Seitz's house is about 100 yards, and the house is considerably hidden from view. There were present at the commencement, Mayberry, Watson and myself; Charles and Ed. Seitz shortly afterward; did not see Lassater till after the difficulty. After the flipping of the cigar, Thomas offered an apology; he seemed to have done it in fun. Charles Seitz picked the knife up and gave it to me. I put it in my pocket, but the pocket was torn and I lost it. The weather was warm and Thomas had his coat off, lying across his lap, before the difficulty commenced. About a month and a half ago at Schmitner's saloon, in Pilot Knob, Charles Seitz told me he knew very little of this case; this week in front of Grandhomme's saloon at Ironton, Lassater told me, in the presence of Isaac M. Johnson and others, that he was not present until the trouble was nearly over and knew very little about this case. (Upon this point the witness Lassater contradicted Warren.) I had been at the saloon nearly all day; had been drinking some; can't say I was pretty drunk, or wasn't. I felt the influence of liquor; am positive I wasn't drunk, nor Thomas, but Mayberry was. I believe Joos struck first, but won't swear positive. I didn't see Ed. hit Joos with his fist before they clinched. I know Thomas had the knife. I believe I saw him strike Joos with the knife, but not at the same place; thought he flipped the cigar in fun; his manner was not insulting. When Ed. struck with the knife, Joos had him down and held him by the throat and struck him with his hand. I considered Thomas' life in danger; I do for a fact. I was not helping Thomas.

John S. Ruple: I was in the saloon the day of the killing; heard Joos and Charles and Ed. Seitz talking about Thomas being in the upper part of town. Joos said if he came down there he would fix him. Afterward he

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told me: If Ed. Thomas comes here to-day I will kill him. I left before the occurrence.

Dr. Geo.W. Farrar, for the State: A man cut through the heart, as Dr. Golding describes this wound to have been, could live no longer than the time required to drain the blood from the brain—perhaps a few minutes. He might live longer, depending on the character, size and direction of the wound.

Oliver Mayberry: I saw the difficulty; first saw Joos talking angry and loud, pointing to a cigar on the ground; then he walked off and came back and took hold of defendant, who sat on the steps, by the shoulder, and wanted to fight him. Defendant said: "Go away. I don't want to fight, I don't know you." Warren said to Joos: "I thought you were a friend of me; if you are give me your hand." Joos gave Warren his right hand, his left still on Ed.'s shoulder. He then pushed Ed. back on the steps' floor. Ed. rose and clinched him, and he threw Ed. five or six steps off. Then they clinched and rolled over and over and finally stopped, Joos on top. Next I saw blood run out of Joos. Ed Seitz ran up to me and said: "We want a fair fight;" and there were a few moments I didn't see him. Ed. Thomas was lying on his back; couldn't see where Joos had hold of him. When Ed. Seitz stopped me defendant was completely under Joos' control. Joos was a large man, very muscular. I saw defendant when he got up; he threw Jocs off, run around him and went to his horse; didn't see him stamp or kick Joos; didn't see defendant have or flourish a pistol or knife; didn't see Lassater take hold of defendant's horse. I was ten or fifteen feet away. Warren, Thomas and myself had been at the saloon all day, talking and drinking a glass of beer occasionally; don't think at the time of the occurrence I was drunk. I didn't see defendant slap the cigar out of Joos' mouth; didn't see everything; wasn't noticing them; noticed what happened afterward; didn't see Joos before the cigar affair: couldn't swear where he came from; hadn't

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been asleep; didn't wake out of a drunken stupor; may have had my eyes shut before that. Warren and I did not assist Thomas in making the assault; knew Thomas had the knife on him before the difficulty; don't know that he had a pistol. Thomas didn't put his hand in his pocket and then strike Joos. I didn't keep Ed. Seitz away and Warren didn't keep Charles Seitz away while Thomas cut Joos.

John Thomas, brother of defendant: I was at Dr. Thomas' office at Iron Mountain, the day of the homicide. When Lassater came for the doctor he stated in my presence that he wasn't present at the difficulty and didn't know much about it. I had a conversation with Charles Seitz at Middlebrook last spring. He said he didn't see the beginning of it, and didn't know how it was.

Isaac M. Johnson for defendant: I measured the distance from Mrs. Seitz's porch to the steps of Seitz's store yesterday. It is 300 feet. You can't see the saloon door from Mrs. Seitz's porch. A person going from Mrs. Seitz's porch would have to go 200 feet toward the place of the difficulty before he could see a man lying on the ground at the foot of the hill where the difficulty ended. The steps of the store where the difficulty commenced can be seen from Mrs. Seitz's porch.

Dr. Clark Patton for the State: Was present at the inquest; saw a bruise or wound on Joos' face, quite a severe one, about the size or a little larger than a silver dollar.

John N. Carter for defendant: Was present when Lassater came for Dr. Thomas; heard him say he never saw the difficulty, and knew but little about it.

Edward Thomas, the defendant: Joos had a cigar in his mouth, with ashes at the end, an inch long. I aimed in fun to flip the ashes with my finger and accidentally struck the cigar and knocked it out of his mouth. He didn't say or do anything then. Afterward he pointed to the cigar and I told him not to mind it. He said "No good." I thought he meant the cigar and offered him another. He

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walked away; did not seem mad. I remained sitting. In about five minutes he returned. While he was gone there was loud talking in the saloon. Joos and Charles Seitz were talking in German. After that Joos came out again and came up to me, his hands in a fist; he appeared as if he wanted to fight; pointed to a lot out there as if he wanted to fight; kept pretty close to me; spoke German, which I did not understand. I told him I wasn't mad, not to come closer; that I didn't want to fight. He stopped a little, went toward the saloon ten or twenty feet and came back toward me and repeated same motions; walked right close up to me. I told him to keep his hands off; that I wanted no fuss. He took me by the shoulder, talking German all the time; caught me by the coat collar—by the shoulder, my coat was lying across my lap. Warren stepped in between us and offered a cigar and said to him: "Ain't you a friend of mine?" He said "Yes." "Well," said Warren, "take a cigar from me. He don't want to fight you." After that Warren stepped back, and Joos caught me by the other hand and gave me a jerk forward and threw me on my hands and knees on the ground, five or six feet off. I started to get up. When half up, he down me again, both went down together; we rolled down the hill, first one on top, then the other. When we stopped, Joos was on top. He was a large, very stout, muscular man; had me by my right arm about the elbow with his left hand; was striking me along the side of the head with his right; then he let go of my right arm and caught me by the throat with his left hand; kept striking and holding me by my throat. I didn't do much of anything; couldn't; had a knife in my pocket; tried to get hold of it; got it out and drew it back. Somebody stepped on my arm, then got off. I cut the man on me with my knife; made thrusts; couldn't see whether I hit him or not. He was holding and pounding me when I drew the knife. I drew it with the intention to get him off; he would have killed me if I hadn't. After I used the knife he relaxed his hold on my throat

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and I threw him off; didn't kick or stamp; went to my horse. When I mounted my horse wheeled. As soon as I got hold of the rein I pulled him right around and went home; had no knife in my hand then; had no pistol that day; had been drinking beer, but was not intoxicated. Joos was a stranger to me when I flipped his cigar. I showed the dirk to Warren on my way to Middlebrook in the morning; put it into my right pants' pocket; did not put it there to have it handy to cut my way out if I should get into a difficulty. When he took me by the shoulder, he got hold, I guess of my vest and shirt collar. I didn't get up and pull my coat off and hit him; didn't draw my knife at the top of the hill and strike him then; when I had got him off, I went round him, but not to see if I had finished him, or to hit or kick him.

Doctor W. G. Thomas for defendant: When Ellis Lassater came for me he said he was in the garden when the fight commenced and did not see it.

Valentine Effinger and Fred. Kath's for the State, against defendant's objection, testified to the good character of Chas. Seitz and Ed. Seitz.

The foregoing is the substance of the testimony.

The defendant's counsel asked, but the court refused to give the following instructions:

The law of self-defense is emphatically the law of necessity; to which a party may have recourse under certain circumstances to prevent any reasonably apprehended great personal injury, which he may have reasonable grounds to believe is about to fall upon him. If you believe that defendant had reasonable cause to apprehend a design on the part of deceased to commit a felony upon defendant, or to do him some great personal injury and that there was reasonable cause to apprehend immediate danger of such design being carried out, and he cut the deceased with a knife and killed deceased to prevent the accomplishment of such apprehended design, then the killing is justified upon the ground of self-defense, and you should acquit. It is not

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necessary to this defense that the danger should have been real or actual, or that the danger should have been impending and immediately about to fall. If you believe that defendant had reasonable cause to believe the facts, and he cut deceased under such circumstances as he believed "to prevent such expected harm," then you should acquit. But before you acquit on the ground of self-defense you ought to believe that defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause have been established before you by the evidence, you are to determine; and unless the facts constituting such reasonable cause have been established before you by the evidence in the case, you cannot acquit in such case on the ground of self-defense, even though you may believe defendant really thought his apprehension reasonable.

In determining the fact as to whether the deceased, Nicholas Joos, first assaulted the defendant, the jury will take into consideration as tending to show that fact, any threats previously made by the deceased, if any, whether communicated to defendant before the difficulty occurred or not.

The jury are the sole judges of the weight of the evidence in the cause, and the credibility of the witnesses, including Ellis Lassater, Charles Seitz, Edward Seitz and Herman Held. Therefore, if you believe from the evidence that any witness has willfully testified falsely as to any material fact in the case, you are at liberty to reject the whole of the testimony of such witness.

The court, of its own motion, gave the following instructions :

1. Gentlemen of the jury: The court instructs you that the defendant, Edward Thomas, stands charged in this indictment with murder of the first degree; and, under the evidence in this cause, you must convict defendant either of murder of the first or second degree, or manslaughter of the third or fourth degree, or acquit him on the ground of self-defense.

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2. If you believe and find from the evidence in this cause that defendant, at the county of Iron and State of Missouri, at any time prior to the 26th day of April, 1881, willfully, deliberately, premeditatedly and of his malice aforethought, stabbed, with a knife, and by stabbing killed one Nicholas Joos, you should find him guilty of murder of the first degree. He, who willfully, that is, intentionally, uses upon another, at some vital part, a deadly weapon such as a knife, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and, knowing this, must be presumed to intend death, which is the probable consequence of such an act; and if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly and from a bad heart. If, therefore, you believe and find from the evidence in this cause that defendant took the life of Nicholas Joos, by stabbing him in a vital part, with a knife, with a manifest design to use such weapon upon him and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason, cause or extenuation, then such killing is murder of the first degree. And while it devolves on the State to prove the willfulness, deliberation, premeditation and malice aforethought, all of which are necessary to constitute murder of the first degree, yet, these need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing, and if you can satisfactorily and reasonably infer their existence from all the evidence, you will be warranted in finding the defendant guilty of murder of the first degree.

3. If you believe and find from the evidence in this cause that defendant, at the county of Iron and State of Missouri, at any time prior to the 26th day of April, 1881, willfully, premeditatedly and of his malice aforethought, but without deliberation, stabbed with a knife, and by stabbing killed Nicholas Joos, then you should find him guilty of murder in the second degree. If you further believe and

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find from the evidence in this cause that defendant intentionally killed deceased, by stabbing him with a knife, and that such knife was a deadly weapon, then the law presumes that the killing was murder of the second degree, in the absence of proof to the contrary; and it devolves upon defendant to adduce evidence to meet or repel that presumption, unless such presumption is repelled by the evidence introduced on the part of the State.

4. If you believe and find from the evidence in this cause that the defendant, at the county of Iron and State of Missouri, at any time within three years prior to the 26th day of April, 1881, killed said Joos, in a heat of passion, without a design to effect death, but in a cruel or unusual manner, but not under such circumstances as to justify him upon the ground of self-defense, then you should find him guilty of manslaughter in the third degree.

5. If you believe and find from the evidence in the cause that said Joos first assaulted defendant, or that defendant entered into the difficulty with no design to use his knife, and while under the influence of violent passion, aroused by the acts and conduct of said Joos, he drew his knife during the altercation and fatally stabbed and killed deceased, but not in a cruel or unusual manner, without malice, as defined in these instructions, whether with or without an intent to kill; and that he did this under such circumstances as did not justify him, upon the ground of self-defense under the sixth instruction given you by the court, then you should convict defendant of manslaughter of the fourth degree.

6. The word willfully, as used in these instructions, means intentionally, not accidentally. "Deliberately" does not mean brooded over, considered or reflected upon for a week, a day or an hour, but it means an intent to kill, executed by the defendant in a cool state of the blood in furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful purpose and not under the influence of a violent passion suddenly aroused by a

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real or supposed grievance, amounting to a temporary de-thronement of reason. A heated state of the blood produced by no legal or adequate cause of provocation is discarded, but when produced by such a provocation, it is by the law denominated passion or excitement of mind. When the mental excitement or passion is suddenly produced by an adequate cause of provocation such as opprobrious epithets and the like, and is produced to such a degree as to materially impede or interfere with the reason or judgment, then there can be no legal deliberation in an act done under its immediate and sudden influence, and when this passion is produced by an assault or personal violence not provoked by the defendant, and such passion thus aroused is so violent as to render one not unconscious of the act, but deaf to the voice of reason, and under the control of such a passion he suddenly acts, it is not an act of deliberation or of malice. "Premeditatedly" means thought of beforehand, for any length of time however short. "Malice," as used in the indictment, does not mean, in the legal sense, mere spite, ill-will or dislike, as it is ordinarily understood, but it means that condition of mind which prompts one person to take the life of another, without just cause or justification, and signifies the state of disposition which shows a heart regardless of social duty and fatally bent on mischief; and malice aforethought means that the act was done with malice and premeditation.

7. The right to defend one's self against danger, not of his own seeking, is a right which the law not only concedes but guarantees to all men. The defendant may, therefore, have killed deceased and still be innocent of any offense against the law. If, at the time he stabbed deceased he had reasonable cause to apprehend on the part of deceased, a design to do him some great personal injury, and there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and to avert such apprehended danger he stabbed, and at the time he did so, he had reasonable cause to believe, and did believe

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it necessary for him to use his knife in the way he did, to protect himself from such apprehended danger, then, and in that case, the stabbing was not felonious, but was justifiable, and you ought to acquit him upon the ground of necessary self-defense. It is not necessary to this defense that the danger should have been actual or real, or that danger should have been impending and immediately about to fall. All that is necessary is that defendant had reasonable cause to believe and did believe these facts. But before you acquit on the ground of self-defense, you ought to believe that defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause have been established by the evidence, you are to determine, and unless the facts constituting such reasonable cause have been established by the evidence in the cause, you cannot acquit in such case, on the ground of self-defense, even though you may believe that defendant really thought he was in danger.

But on the other hand, gentlemen, the law does not permit a person to voluntarily seek or invite a combat, or put himself in the way of being assaulted, in order that when hard pressed he may have a pretext to take the life of his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any willful act of his, or where he voluntarily and of his own free will, enters into it; no matter how imminent his peril may become during the progress of the affray. The necessity being of his own creation, shall not operate to excuse him. Nor is any one justified in using any more force than is necessary to get rid of his assailant. But if he does not bring on the difficulty nor provoke it, nor voluntarily engage in it, he is not bound to flee to avoid it, but may resist with adequate and necessary force until he is safe.

Now, if you believe from the evidence in this cause that the defendant voluntarily sought or invited the difficulty in which said Joos lost his life, or that he provoked

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or commenced, or brought it on by any willful act of his own, or that he voluntarily and of his own free will, engaged in it, then, and in that case, you are not authorized to acquit him upon the ground of self-defense, and this is true no matter how violent his passion became, or how hard soever he was pressed, or how imminent his peril became during the progress of the affray. In determining who provoked or commenced the difficulty, or made the first assault, you should take into consideration all the facts and circumstances in evidence before you.

8. You are the sole judges of the weight of the evidence and the credibility of the witnesses in the cause, and if you believe any one of them has willfully sworn falsely as to any material fact in the cause, then you are at liberty to disregard the whole, or any part of the testimony of any such witness.

9. The law presumes the defendant innocent of the crime charged against him in this indictment or any less grade, and the burden of proving him guilty thereof, beyond a reasonable doubt, rests upon the State. Now, if after a full and fair review of all the evidence in the cause, you entertain a reasonable doubt of defendant's guilt, you should give him the benefit of such doubt and acquit him; but such doubt, to authorize you to acquit him on that ground alone, should be a substantial doubt touching his guilt and not a mere possibility of his innocence.

10. If you convict defendant of murder of the first degree, you will by your verdict simply so say. In that case, you have nothing to do with the punishment to be inflicted. But if you acquit him of murder of the first degree and convict him of murder of the second degree, you will assess his punishment at imprisonment in the penitentiary for a term of not less than ten years, and if you acquit him of murder of both degrees, but convict of manslaughter of the third degree, you will assess his punishment at imprisonment in the penitentiary for a term of not less than two nor more than three years, or by imprisonment

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in the county jail not less than six months, or by fine not less than \$500, or by both a fine not less than \$100 and imprisonment in the jail not less than three months. And if you acquit him of murder and manslaughter of the third degree, and convict him of manslaughter of the fourth degree, you will assess his punishment at imprisonment in the penitentiary for two years, or in the county jail not less than six months, or by fine not less than \$500, or by both a fine not less than \$100 and imprisonment in the jail not less than three months. And if you find the defendant not guilty of any offense, you will return a verdict to that effect.

Dinning & Burnes for appellant.

D. H. McIntyre, Attorney General, for the State.

SHERWOOD, J.—The defendant was indicted for murder in the first degree, and on trial was convicted of murder in the second degree, and his punishment assessed at ten years in the penitentiary.

The case as a whole was well tried, and the instructions prepared by the court, of its own motion, are exceptionally good. They embraced within their scope the various grades of murder and of manslaughter in the third and fourth degrees. The evidence was of such a nature as to warrant instructions for these various degrees of homicide. The instructions given by the court, of its own motion, fully embodied those asked by the defendant, and there was, therefore, no error in refusing them.

We have carefully read the evidence in this case, and there would seem to be much ground for the opinion that a different verdict could well have been returned by the jury; but that was a matter for them, and so long as proper instructions are given and there is evidence which supports the verdict, it is beyond our province to interfere. *State v. Musick*, 71 Mo. 401.

I. WEIGHT OF EVIDENCE.

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But for the very reason that the verdict of the jury is to be final in the circumstances we have mentioned, care ^{2. EVIDENCE OF} ~~CHARACTER: PRACTICE.~~ should be taken that nothing should occur during the trial to influence the minds of the jurors and lead them to a conclusion different from that to which they would probably have come had improper evidence not been admitted. This is especially true where, as here, the testimony is very conflicting, and where it would seem to require but a slight circumstance to turn the scale either way. We allude now to the court permitting the prosecuting attorney to introduce evidence to support the character of Ed. Seitz, whose character had not been attacked. This was clearly incompetent evidence. *State v. Cooper*, 71 Mo. 436; 1 Greenleaf Ev., § 469; 1 Wharton Ev., § 569. Ed. Seitz was the only witness who swore that when the combatants reached the bottom of the hill, Joos was on the bottom and "Ed. on top." The evident purpose of thus bolstering the testimony of Seitz was to strengthen his testimony before the jury, and by doing this to impress upon them the idea that the theory of self-defense had no support in the facts of the case. It is impossible to calculate the injury which the introduction of this evidence—thus unwarrantably and over the objection of the defendant introduced—did to him. We certainly will not assume that no injury resulted to the defendant in consequence of its introduction, sanctioned as it was by the express approval of the court. "A judgment, even in a criminal case, will not be reversed for immaterial errors. In such cases, however, courts will rarely presume that the particular evidence which has been wrongfully admitted could have had no influence on the minds of the jury." *McKnight v. State*, 6 Tex. App. Rep. 158, and cases cited. "If the minds of the jury, at that juncture, were still tremulous with indecision between the innocence and the guilt of the prisoner, the reception of such testimony was sufficient to turn the scale against him. And the courts will hesitate long before they will say that the violation of a plain rule of

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evidence, as in the present instance, did not operate to the prejudice of the accused." *State v. Jaeger*, 66 Mo. 173.

We make no comment on the unseemly exhibition of rivalry exhibited during the trial of the cause by physicians who were summoned as witnesses, in the hope that it may not again occur. "When doctors disagree" they should select some other arena—some other time and place than a court-house where a human being is being tried for his life or liberty—for such exhibitions as were witnessed during the trial of this case. We will not be understood as denying to attorneys the assistance which physicians, skilled in their profession, may give in the investigation of wounds in cases of homicide; but certainly such assistance can be secured without bringing the witnesses forward as contestants rather than witnesses.

For the reason aforesaid, judgment reversed and cause remanded. All concur, except NORTON, J., absent.

WINTERS v. CHERRY, *Appellant.*

1 **Statute of Frauds: VERBAL AGREEMENT: WHOLLY EXECUTED ON ONE SIDE.** By an instrument of writing C. leased of W. a store-house in the town of Trenton, for a term of three years, from November 2nd, 1874. In December, 1876, while C. was in possession of the premises it was verbally agreed between the parties that W. should fit up the basement of the house for a carpet room, and that C. in consideration of this improvement, should pay W. \$100, and continue the lease of the store for two years after the expiration of the written lease. W. made the improvement agreed upon and C. entered into the possession of the new room and paid the \$100. *Held*, that the verbal agreement constituted a valid lease of the property for a period of two years from November 2nd, 1877: that it was not void under the Statute of Frauds, for want of a writing, because it was wholly executed by W. in the completion of the improvement agreed upon. The fact that there remained on W.'s part the duty to permit C. to enjoy the premises for the period of two years does not bring the agreement within the statute.

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2. — : — : TO BE EXECUTED WITHIN ONE YEAR. A verbal agreement, made in December, 1876, for a lease of property, during the month of November, 1877, is to be executed within one year, and hence is not void under the Statute of Frauds.

*Appeal from Grundy Circuit Court.—Hon. G. D. BURGESS,
Judge.*

AFFIRMED.

Shanklin, Low & McDougal for appellant.

C. A. Winslow for respondent.

PHILIPS, C.—The conceded facts of this case are substantially that the appellant had leased, in writing, from respondent, for a term of three years, a brick store-house in the city or town of Trenton, in Grundy county. This lease by its terms would end November 2nd, 1877. In December, 1876, during the existence of this lease, the appellant being anxious to have the use of an unfinished basement to this store-house, which was not embraced within the terms of the written lease, proposed to respondent that if he would fit up this basement for a carpet room for appellant's use, he would pay respondent \$100, and continue the lease of the store-house, including the basement, for two years after the expiration of the term of the written lease, at a rental of \$66.66 per month. Accordingly respondent immediately so fitted up said basement at an expenditure of \$300 or more. Appellant paid him the \$100, and took possession of said basement room, and continued to hold it and the store-room until the expiration of the original three years' lease, when he quit the premises without notice to the landlord, and refused to pay any rent afterwards. Respondent instituted this action against appellant in a justice's court to recover the first month's rent accruing from and after the 2nd day of November, 1877, amounting to \$66.66. Judgment by justice for respondent for this sum. Appellant appealed to the circuit court, where on a trial *de novo*,

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a like judgment was again rendered for respondent, and the defendant below brings the case here on appeal.

The appellant seeks a reversal of the judgment chiefly on two grounds: First, because the contract concerned lands and tenements, and not being in writing, signed by the party to be charged therewith, was void under the provisions of the Statute of Frauds; second, because the agreement was not to be performed within one year from the making thereof, and not being in writing, is void by operation of said statute.

I do not deem it necessary to discuss the many questions raised and so forcibly argued by counsel in their briefs. The Statute of Frauds is a crude and intricate piece of legislation, and in judicial determinations has produced divers conclusions, anomalies and confusions. No mind may reasonably expect to harmonize or reduce from the mass of discussion and learning any common basis acceptable to all courts and text makers. In the multiform issues springing from this most prolific womb of strife, each case must, in a measure, be determined by its own peculiar circumstances.

The contract, in question, was verbal. The appellant contends that the arrangement was only for a lease, and did

1. STATUTE OF FRAUDS: verbal agreement: wholly executed on one side.

not amount to an actual lease, in which the lessee acquired an interest—an *interesse termini*. And that in any event, it being a verbal agreement could not be made the basis of an action for use and occupation, unless the lessee entered into actual occupancy of the premises. Taylor L. and T., § 37. But under the facts of this case was not the agreement "a lease?"

The lessee was already in possession of the store-house, and by this agreement he obtained, entered into and occupied the carpet room, in conjunction with the store-house. The agreement, in the language of Ames, J., in *Shaw v. Farnsworth*, 108 Mass. 359, "was not to take a lease of the house, but to take the house for a specified term, and a

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specified rent." In this Massachusetts case, as here, the lessee was already in possession of the premises, and he proposed to the owners that if they would put a new furnace in the house he would take the house for three years from a certain future day, when his present lease expired, paying \$300 therefor per annum from that date. This proposition was accepted. The furnace was put in before the three years began to run. It was held that this made "a present demise to commence in *futuro*. * * The only thing left conditional in the arrangement was the putting in of a new furnace by the lessors, and that consideration was fulfilled before the day appointed for the commencement of the new term." It is true that in that case the arrangement was evidenced by a memorandum in writing, but this does not affect the question as to whether it amounted to a lease or an agreement for a lease. See also *Halley v. Young*, 66 Me. 520; *Bussman v. Ganstor*, 72 Pa. St. 285, 290.

The 1st section, chapter 62, Wagner's Statutes, did not make a verbal lease for a term of years void, but a lease "by parol * * shall have the force and effect of leases at will only." Under this section it was held, in *Kerr v. Clark*, 19 Mo. 132, affirmed in *Ridgley v. Stillwell*, 28 Mo. 400, that such a lease had the effect of creating a tenancy from year to year.

In 1869 the legislature enacted the following provision: "A tenancy at will or by sufferance, or for less than one year, may be terminated by the person entitled to the possession by giving one month's notice, in writing, to the person in possession, requiring him to remove; all contracts or agreements for the leasing, renting or occupation of stores, shops, houses, tenements or other buildings in cities, towns or villages, not made in writing, signed by the parties thereto or their agents, shall be held and taken to be tenancies from month to month, and all such tenancies may be terminated by either party thereto, or his agent, giving to the other party, or his agent, one month's notice, in writing, of his

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intention to terminate such tenancy." Wag. Stat., p. 879, § 13.

It is important to mark the language of this section : "All contracts or agreements for the leasing, renting or occupation of stores, shops, houses or other buildings, in cities, towns, etc., not in writing, shall be held and taken to be tenancies from month to month." Under this section a verbal agreement is as effectual, in respect to leases in towns, etc., as if made in writing. The only limitation placed on it by this statute is, that it shall operate only as a tenancy from month to month. The premises in question consisted of a store-house in town. The contract or agreement made the tenancy, although not in writing, and the action could be had on it for the month's rent the same as if it had been in writing.

And even conceding, for the sake of argument, that an actual entry on the premises under the contract was necessary, it is not perceived that this requirement is not met by the facts of this case. In December, 1876, the new agreement was made. By it the carpet room was added as a present interest to the existing lease. The \$100 paid therefore was not the sole consideration of the new agreement. But parcel and part of it was the present joint occupancy of the whole house, and to be continued for two years from and after the 2nd day of November, 1877. The contract, like the occupancy, was a unit. It was not severable. The tenant only wanted the carpet room as an appurtenant to the store-room, and the landlord did not fit up the carpet room for the \$100 alone, but for the further consideration of the continued occupancy of the store-house. They were inseparable. No rental was fixed on the carpet room as such. It and the store-room together were to yield \$66.66 per month.

Now, there can be no question, even under defendant's theory, but that the plaintiff was entitled to recover for the carpet room, inasmuch as there was actual occupancy of it under the contract. But how, under the facts of this case,

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could there be any separate recovery of rental for an integral part of premises embraced in the letting of the whole? There is no method, in the action on the contract of lease, of ascertaining any separate value for it. The contract was an entirety, and must stand or fall all together. No such construction in view of the statute above quoted, in our opinion, ought to obtain as would enable this defendant to escape the entire contract. The statute of frauds invoked therefor, would itself become an instrument of fraud. There is no legal barrier to the incorporation and continuation of the written lease in the new verbal agreement, so that the latter may become presently operative without interfering with the consummation or completion of the other. *Cummings v. Arnold*, 3 Met. 489; *Goss v. Lord Nugent*, 5 Barn. & Ad. 65; *Henning v. U. S. Ins. Co.*, 47 Mo. 431. The failure of the lessee to enter into the occupancy would not impair the lessor's right of recovery. "The rent becomes due upon the lease, not upon the entry, and the action is upon the covenant as for a breach of an executory covenant." *Austin v. Huntsville Coal & Mining Co.*, 72 Mo. 544. When the lessee defendant quit the house in November, 1877, he quit the entire premises without any notice to his landlord. To terminate a tenancy under this statute the required notice must be given at or before the end of the current month. *Gunn v. Sinclair*, 52 Mo. 327.

The Statute of Frauds, relied on by the defendant, cannot avail him. A party to a verbal agreement ought not to be permitted either to enjoy its fruits on the one hand, or to suffer his confiding co-contractor to wholly perform on his part, and then to shield himself against performance by pleading this statute. Here the respondent altered his condition on the faith of this agreement. He paid out \$300 in money in equipping the basement at appellant's request, placed him in possession of it, and inside of the year performed the whole contract on his part. This is not met by the suggestion in appellant's argument that there yet remained on the lessor's part the duty to permit the lessee to

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enjoy the premises for the remaining two years. This is simply a refinement. He had the possession, and did not enjoy the fruit because he would not pluck it.

Finally, appellant contends that although the lessor performed "everything on his part within the year, if a longer time is stipulated for the performance by the other," the case is still within the statute, citing *Lockwood v. Barnes*, 3 Hill 128; *Broadwell v. Getman*, 2 Denio 87; *Pierce v. Paine*, 28 Vt. 34, and other cases. We concede this, with some qualification, to be the ruling in Massachusetts, Vermont, New Hampshire and New York. But it is opposed to the weight of authority in England and we think in America. *Cherry v. Heming*, 4 Exch. 631; *Donellan v. Read*, 3 Barn. & Ad. 899, (23 E. C. L. 215;) *Hoby v. Roebuck*, 7 Taunt. 157, (2 E. C. L. 57;) *Souch v. Straubridge*, 2 C. B. 808; *Roydell v. Drummond*, 11 East 152; *Smith v. Neale*, 2 C. B. N. S. 67; *Berry v. Doremus*, 30 N. J. L. (1 Vroom) 403; *Haugh v. Blythe*, 20 Ind. 24; *Curtis v. Sage*, 35 Ill. 22; *Morgan v. Bitzenberger*, 3 Gill (Md.) 350; *Johnson v. Watson*, 1 Kelley 348; *Rake v. Pope*, 7 Ala. 171; *McClellan v. Sanford*, 26 Wis. 595.

In this State, whatever may be said against it, the Supreme Court is in accord with the cases last cited. In *Blanton v. Knox*, 3 Mo. 342, the court cites with approval an old English case which held that where "all that was to be done on one side was to be done within the year," as sufficient to take the case out of the statute. In *Suggett v. Casson*, 26 Mo. 221, 225, Scott, J., says: "The contract having been entirely performed on one side, the other side cannot interpose the defense arising under this section," (the 5th section in question). And this learned judge cites with approval the leading English case of *Donellan v. Read*, *supra*. Counsel express surprise that Judge Scott should cite the case last named in support of the case under consideration, as it was not germane. The case may have been inapplicable, but its approval indicates the judicial mind of our Supreme Court. It is not every *obiter dictum* that is

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unauthoritative. *Kane v. McCown*, 55 Mo. 199. Ewing, J., in *Atwood v. Fox*, 30 Mo. 500, also draws the distinction between partial performance and entire performance; and, *sub silentio*, concedes "that where the contract has been entirely performed on one side, the other side cannot interpose the statute in question." If any additional citations were needed to indicate the mind of the Supreme Court of this State touching this question, surely the language of Wagner, J., in *Selby v. Cordell*, 45 Mo. 345, is direct and broad enough. He says, page 346: "It is true that the contract could not be wholly performed within one year, but it was entirely and completely executed by one of the contracting parties, and it is the established doctrine of this court, and the settled law of this State, that when an agreement, not in writing, has been wholly performed on one side, the other party thereto cannot interpose the defense of the statute of frauds."

A departure at this day from the adjustment of this question in our State, would be an innovation with no apparent compensation. On so vexed a question *stare decisis* is the watchword. It is needful not only to the bench and bar, but for the repose of society. The observation of Dixon, C. J., in *McClellan v. Sanford*, *supra*, touching those cases holding the opposite view of this controversy, commends itself to my mind: "Whilst they adhere to a strict and literal construction of the statute in order to close the door to the mischiefs which they suppose the statute was designed to prevent by excluding parol evidence, *

* they yet seem to leave the door wide open to the same mischiefs by allowing parol evidence to be introduced to show what the contract was, and what the price or sum agreed to be paid, for the purpose of enabling the promisee or creditor to recover upon a *quantum meruit* or *quantum valbat*. The advantage of this course of decision is not perceived."

But what is a complete answer to appellant's position, is the fact that by operation of the act of 1869, *supra*, this

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2. _____ : to verbal contract constituted a tenancy "from be executed within one year." month to month." It was made in December, 1876, and by its admitted terms would become operative on the 2nd day of November, 1877. This suit is to recover on this contract for the first month beginning on the 2nd day of November, 1877. It was, therefore, a contract that might and would be performed inside of the year, and is not, therefore, subject to the denunciation of the statute. *Foster v. McO'Blenis*, 18 Mo. 88; Browne Stat. of Frauds, § 285; *Mavor v. Pyne*, 3 Bing. 285.

I discover no error in this record, and the judgment of the circuit court should, therefore, be affirmed. MARTIN, C., concurs; WINSLOW, C., having been of counsel, did not sit.

IN THE MATTER OF CHARLES B. CLEMENTS.

Adoption of Children. A widowed mother joined in executing a deed of adoption of her child. A day or two afterward, at her request, the adopter signed a paper stating that she could "have her son (the adopted child) at any time she calls for him." Held, (1) that under the statute, (R. S. 1879, § 601,) by joining in the deed she relinquished her parental rights over the child; (2) that the subsequent paper could not be construed to work a revocation of the deed; it was evidently intended to allow her only the temporary custody and society of the child.

Petition for Habeas Corpus.

Chas. A. Winslow for petitioners

R. L. Brockenbrough for respondent.

Hough, C. J.—This is a proceeding under the *habeas corpus* act, at the relation of the Managers of the Roman Catholic Orphan Asylum, a body corporate, asking to have

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the person of Chas. B. Clements, an infant five years of age, taken from the custody of the respondent, Wm. V. Rutledge, and delivered to them. The relators claim the right to the custody of said child under and by virtue of an instrument in writing executed July 3rd, 1882, by Sallie D. Clements, mother and sole surviving parent of said child, committing the care, custody and education of said child to them. The respondent claims the right to the custody of said infant by virtue of a certain deed of adoption executed by him March 1st, 1882, under sections 599, 601, of the Revised Statutes, to which deed the said Sallie D. Clements was a party, and by which she consented to said adoption, and released to said Rutledge, all her right to the care and custody of said infant. This deed was duly acknowledged by the said Rutledge and the said Clements, and was recorded in the recorder's office March 2nd, 1882. A day or two after the deed of adoption was executed, the respondent, at the request of Mrs. Clements, signed a paper stating that "Mrs. Clements can have her son, Charles B. Clements, at any time she calls for him." The principal question presented for determination is as to the effect of the deed of adoption, executed by the respondent and the mother of the child.

The statute under which the deed in question was made, is as follows:

"Section 599. If any person in this State shall desire to adopt any child or children, as his or her heir or devisee, it shall be lawful for such person to do the same by deed, which deed shall be executed, acknowledged and recorded in the county of the residence of the person executing the same, as in the case of conveyance of real estate.

"Section 600. A married woman, by joining in the deed of adoption with her husband, shall, with her husband, be capable of adopting any child or children.

"Section 601. From the time of filing the deed with the recorder, the child or children adopted shall have the same right against the person or persons executing the

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same, for support and maintenance and for proper and humane treatment, as a child has, by law, against lawful parents; and such adopted child shall have, in all respects, and enjoy all such rights and privileges as against the persons executing the deed of adoption. This provision shall not extend to other parties, but is wholly confined to parties executing the deed of adoption."

It is contended on behalf of the relator, that the 3rd section of the foregoing statute (§ 601) is unconstitutional, inasmuch as its provisions cannot be carried into effect unless the adoptive father is invested with the right to the custody and control of the child adopted, and said section, therefore, impliedly gives to the adoptive father such custody and control, without the consent of the natural parents. It is further contended, that as the consent of the parents is not provided for by the statute, the consent of Mrs. Clements, embodied in the deed of adoption, that the respondent should assume the custody and control of her child, can have no other or greater effect than it would have, if she had not joined in the deed of adoption, and such consent had been given orally, or in a separate instrument; in which case, it is claimed, on the authority of *The Matter of Berenice S. Scarritt*, 76 Mo. 565, the consent so given would be revocable at the pleasure of the mother.

The statute in question, it must be confessed, is quite imperfect and very unskillfully drawn, but when carefully considered, we think it will be found to contain enough to effectuate its general purpose. The 1st section (§ 599) is complete and perfect in itself, and authorizes any person to adopt the child of another so as to make him his heir, without the consent of the parents or other person. *Reinders v. Koppelman*, 68 Mo. loc. cit. 499. This, the legislature, having undoubted power to enact a statute of descents, may lawfully authorize to be done. This section, it will be perceived, does not undertake to create or establish the relation of parent and child between the adopter and the adopted, further than to give the child adopted a right of

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inheritance to the same extent, as if he or she were the child of the adopter. The privilege thereby conferred may be of no pecuniary or other benefit to the recipient, until the death of the adopter.

But the 3rd section (§ 601) goes further, and gives the child adopted a right during the life of the adopter, to have and receive from him, or her, support, maintenance and proper and humane treatment. The devolution of these parental duties upon the adoptive father necessarily implies that he is to have the custody and control of the child adopted. But as the legislature has no power to authorize one person, whether acting from motives of charity, benevolence or caprice, to transfer to himself at his own election, the custody and control of the children of another, it is declared in the last clause of this section that "this provision," meaning the whole of the 3rd section, wherein the rights express or implied hereinbefore mentioned, are conferred, "shall not extend to other parties, but is wholly confined to parties executing the deed of adoption." That is to say, parties who do not join in the deed of adoption shall not be affected by anything contained in the 3rd section; or, to state the matter differently, the natural relations of parent and child, and the rights and duties springing therefrom, are not to be disturbed without the consent of the natural parent. The language employed to convey this idea, it must be admitted, is exceedingly lame, but it is the only rational construction which can be placed upon it. It is twice plainly declared in previous portions of section 3, that the parental duties arising from the privileges therein conferred upon the child adopted, are confined to the adoptive parent, and we are not at liberty to suppose that the last clause was intended simply to re-assert the same thing and thereby render the section nugatory, when a construction may be given to such clause which will make the section operative. We are, therefore, of opinion that the deed of adoption in this case, executed as it is by the mother as

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well as by the respondent, entitles the respondent to the custody of the child.

Under this view of the statute and the deed, it will be unnecessary to consider the second proposition advanced by the relators, further than to say, that the agreement of the respondent to permit Mrs. Clements to have her son at any time she might call for him, was evidently intended to allow her only the temporary custody and society of her son, and that even if said agreement were intended to have a broader signification, it cannot be held to work a revocation of the deed of adoption. It may not be out of place here to express the hope that the defects of this statute will at an early day be remedied by appropriate legislation, as cases which can easily be imagined may arise thereunder, that will be incapable of any very satisfactory solution.

We are of the opinion that the said Charles B. Clements should be remanded to the custody of the respondent, Wm. V. Rutledge, and judgment will be entered accordingly. The other judges concur, except Judge SHERWOOD, who did not sit.

THE CITY OF KANSAS v. KNOTTS *et al.*, *Appellants.*

1. **Courts: JUDGE A PARTY TO THE RECORD.** Where the circuit court consists of two judges sitting separately, (as in Jackson county,) if both happen to be parties to the record of a cause, it is not error for the one before whom the cause comes in the ordinary course to refuse to send it to the other for trial.
2. ——. A judge who is a party to the record cannot sit in the case even by consent of parties. The statute which authorizes a judge "who is interested in any suit" to try it, if the parties consent, has no application to such a case. R. S., § 1041.
3. **Eminent Domain: PUBLIC USE.** It sufficiently appears from the record in the present case that there was a judicial determination that the use for which defendant's land was taken was really a public use.

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Appeal from Jackson Circuit Court.—Trial before C. O. TICHENOR, Esq., sitting as Special Judge.

AFFIRMED.

L. C. Slavens for appellants.

D. S. Twitchell for respondent.

MARTIN, C.—This was a proceeding by the City of Kansas to condemn private property for the opening and extension of Sixth street from Tracy avenue to Woodland avenue in said city. The proceeding was instituted in pursuance of ordinance No. 21,039 of the common council of said city, which was approved on the 7th day of June, 1881. The ordinance prescribes the boundaries within which the property was to be condemned, and declares that “all private property within said boundaries is hereby taken and condemned for public use, as an extension of said Sixth street, and just compensation therefor shall be assessed, collected and paid according to law.” The ordinance also prescribes the limits within which “private property shall be deemed benefited by reason of the proposed improvement, mentioned in the preceding section, and be assessed and charged to pay just compensation therefor.”

The cause was first tried before the mayor, then taken by appeal to the circuit court, where it appeared in division No. 2 of said court. Hon. F. M. Black, judge of division No. 2, was not only interested in the suit as owner of property lying within the limits of assessment, but he was a party to the record, his name being included in the original notice to the property owners subject to charge and assessment. There being no consent of the parties to a trial by His Honor Judge Black, the appellants requested him to send the case to division No. 1, presided over by Hon. Turner A. Gill, judge of that division. This request was refused by Judge Black for the reason that it appeared from the

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record of the cause that Judge Gill was also a party to said cause.

The parties having failed after this ruling to select a special judge, an election was held by the clerk, which resulted in the selection of C. O. Tichenor, Esq., an attorney of said court. The case was tried by the special judge so elected, and resulted in a complete condemnation of the property required for the extension of Sixth street, and a very general assessment of charges for benefits on account of the extension. It seems from the record that appellant was adjudged \$1,500 damages for his property within the limits of condemnation, and \$1,000 benefits to his property within the limits of assessment for benefits, which would leave him entitled to a balance of \$500 on his money judgment. In his appeal to this court, he presents two questions, which were raised by his motion for a new trial. They are as follows: 1st, That the cause should have been sent to the other division of the court; 2nd, That there was no judicial determination whether the property attempted to be taken was really for a public use.

I. We do not think any error was committed by Judge Black in refusing the request of the appellant to send the case to Judge Gill, under the circumstances disclosed in the record. The object of the request was, as we are informed by appellant, to afford the parties an opportunity to consent to Judge Gill trying the cause. By the 11th section of the act reorganizing the 24th judicial circuit, it is provided that "no change of venue shall be allowed by said circuit court for any reason that may be alleged against the judge of the division to which the same is assigned, but if any such reason exist the cause shall be transferred to the division held by the other judge; but if reason exist against both the judges of said court, then such change may be allowed to the circuit court of some contiguous county, unless otherwise disposed of according to law." Sess. Acts 1879, § 82. The appellant claims that he was deprived of the legal right

1. COURTS: Judge a party to the record.

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to a possible chance in Judge Gill trying the case. He admits this right depended upon the consent of the parties if Judge Gill was interested in the suit, and that he could not have proceeded without such consent. Now it is evident that such consent was substantially withheld by the parties. The city withheld it when it accepted without objection the ruling of Judge Black refusing to transfer the case and permitting the election of a special judge. And Judge Black, who was a party to the case, must have withheld his consent when he entered his ruling.

But there is an obvious reason underlying this matter which in my judgment rendered it legally improper, as 2.— against public policy, for Judge Gill to try the case even with the consent of the parties. According to the record Judge Gill was something more than merely interested in the suit; he was a party defendant, legally served with process, and the record discloses two assessments against him for which execution is ordered. I am unable to perceive how a judge, who is a party to a cause, can properly discharge the functions of a judge in trying his own case. The statute, in my opinion, does not contemplate or authorize such a proceeding, even though sanctioned by the request of the parties. It provides that: "No judge of any court of record, who is interested in any suit or related to either party, or who shall have been of counsel in any suit or proceeding pending before him, shall without the express consent of the parties thereto, sit on the trial or determination thereof." R. S. 1879, § 1041. Certainly this implies that the judge interested in the manner mentioned, may sit and determine the cause by the consent of the parties. But I know of no principle upon which this provision can be invoked in a case where the judge is not simply interested but is an actual party to the cause. I am satisfied that it was never intended to be applied to such a case. Neither am I able to perceive how the supposed consent of the parties could, in any manner, relieve the judge from the embarrassment and absurdity of trying

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his own cause. How can he, with "a decent respect to the opinion of mankind," call himself into his own court for trial, appear before himself in person or by attorney, render judgment in his own favor when he is satisfied that his attorney has made a good case, or turn himself out of his own court when his case is devoid of merit, or commit himself for contempt of court, when he has indulged in the unfortunate misconduct of a litigant! Again, if he is a party to the case, then he must be a necessary party to the agreement or consent which is to enable him to try it. Clearly the legislature never intended he should have the privilege or be compelled to make such an exhibition of himself. He might, with equal approbation of the law, assume to take his own acknowledgment of a deed or perform the ceremony of his own marriage.

It is apparent, therefore, that the appellant lost nothing in the refusal of Judge Black to transmit the cause to the other division of his court. No benefit or advantage could accrue to the appellant in transmitting the cause to the other division for the mere purpose of having the election of a special judge after such transmission. That election must be conducted by the clerk of the court. If the case had been sent to Judge Gill for that purpose, the election would have been conducted before the same clerk, in the same court, (either division is the circuit court,) and before the same bar. It would have been in all its essential features the same election which in fact did take place. There is no good reason why this cause should be reversed in order to have an election of a special judge, after transmission of the case to another division of the circuit court. It would be repeating what has already been done in the same court. The case was properly disposed of by Judge Black under the 11th section of the act of March 24th, 1879, reorganizing the 24th judicial circuit. Reasons existed why both judges could not try the case. No change of venue was applied for, and the case was "otherwise disposed of according to law." Sess. Acts 1879, p. 82.

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II. The counsel for appellant has insisted, in a very able and exhaustive brief, that there has been no judicial ^{a. EMINENT DOMAIN.} determination that the contemplated use, for which the property was condemned, was really a public use. There is sufficient evidence in the record to convince any one that Sixth street, which was already a street devoted to public use, was extended in this proceeding to Woodland avenue for the same public use. The ordinance seems to take and condemn the property "for public use as an extension of said Sixth street." The fact was so obvious that the street was extended for the use of the public, and not for any private use, that very little evidence was submitted to the jury on the point. The record might have been more satisfactory than it is, but we think the judgment that was entered implies a judicial determination of that fact, sufficient, in this case, to comply with the requirement of the constitution. Const., art. 2, § 20. After reciting the verdict the judgment proceeds as follows: "It is, therefore, adjudged, ordered and decreed by the court, that the City of Kansas have and hold the property sought to be taken for the purpose specified in said ordinance of the said City of Kansas." We have seen that the ordinance assumed to condemn the property covered by the street for the use of the public. Upon the whole we think the judgment should be affirmed, and it is so ordered. WINSLOW, C., concurs; PHILIPS, C., absent.

NORTON, J., took no part in this case, being absent.

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WADE V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant.*

1. **Railroads: DAMAGE TO LIVE STOCK: COMPLAINT.** The complaint in this case, (an action under the 43rd section of the Railroad Law for double damages to live stock,) does by implication, though not expressly, negative the possibility that the animal was killed at a public crossing or within the corporate limits of a town or city. The averment is, that it was killed at "a certain point of uninclosed timber land."

The complaint also contained an averment that the animal came upon the track and was killed at a place which the law required the company to protect with a fence or cattle-guard. *Held*, that on this ground also it was sufficient.

2. **— : — : PLACE OF KILLING.** The complaint alleged that the animal was killed in Jefferson township. The case was first tried before a justice of that township. The instructions in the circuit court told the jury that they could not find for plaintiff if the animal was not killed in that township. There was no evidence in the record to show where the killing occurred; but it did not satisfactorily appear that all the evidence was preserved. *Held*, that this court would presume that the killing had been shown to have taken place in Jefferson township.
3. **— : — : INTEREST: HARMLESS ERROR IN INSTRUCTION.** In an action under the 43rd section the court instructed the jury that they might, in addition to double damages, allow the plaintiff interest; but it sufficiently appeared that no interest had been allowed. *Held*, that the instruction was erroneous, but as the defendant had not been prejudiced, the error was immaterial.

*Appeal from Cole Circuit Court.—HON. E. L. EDWARDS,
Judge.*

AFFIRMED.

T. J. Portis and Smith & Krauthoff for appellant.

G. T. White for respondent.

MARTIN, C.—This was an action against a railroad company for the killing of a bull. The action was commenced on the 2nd day of March, 1878, before a justice of Jefferson township in Cole county, and was brought under the

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43rd section of the 2nd article of the Railroad Act as amended by the act of February 18th, 1875. 1 Wag. Stat., 310, § 43; Sess. Acts 1875, p. 131. The action was commenced in the name of George E. Wade, the owner of the bull, and the present plaintiff, after his death, as sole devisee under his will, was substituted as his successor to the right of action. The complaint upon which the action was founded, reads as follows:

"Before H. W. Long, a justice of the peace within and for the State of Missouri, county of Cole, Jefferson township.

George E. Wade, Plaintiff,
v.
Missouri Pacific Railway Company, }
 Defendant. } Complaint.

"Plaintiff states that defendant is a corporation duly incorporated under the laws of the United States and State of Missouri, and is acting as such; and that in the month of October, 1877, while running and operating its locomotives and cars on its railroad track in said township at a certain point of uninclosed timber land near Gray's Creek, wrongfully and unlawfully neglected to erect and maintain a lawful fence on the sides of their said railroad where it passes through uninclosed lands, and unlawfully failed to construct cattle-guards where fences are required sufficient to prevent horses, cattle, mules and other animals from getting on their said railroad at said points, as is required by the statutes in such cases, and that by reason and on account of such failure to erect said fences and construct said cattle-guards, a certain bull, the property of plaintiff, and of the value of \$100, went on to said railroad track at said point, and whilst said bull was on said track as aforesaid, he was run over and killed by said locomotives, cars and trains of defendant, then and there run and managed by its agents and servants. And said bull was wrongfully killed in the manner as herein stated in consequence of his getting on to railroad track as aforesaid, and not having

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cattle-guards as aforesaid. Wherefore plaintiff asks judgment for \$200, double the damage sustained by him by reason of the matters and things herein stated, and under the statute concerning corporations, railroads and railroad companies.

"And for further cause of complaint, plaintiff says that whilst he was the owner of the bull aforesaid, of the value aforesaid, and defendant, whilst operating its locomotives and trains in the township aforesaid, and at the time aforesaid, by its agents and servants so negligently and carelessly ran the same at and near a public crossing, and among other acts of carelessness and negligence then and there failed to ring the bell or sound the whistle, and thereby carelessly and negligently ran over, on their railroad track, said bull of plaintiff and killed him, whereby plaintiff says he is damaged in the sum of \$100, and for which plaintiff asks judgment."

The trial before the justice was by default, and the value of the animal was assessed at \$100, and judgment rendered for \$200, being double damages under the statute. At the trial in the circuit court, which came off on the 28th day of May, 1880, the defendant appeared by attorney, and the plaintiff introduced witnesses, who knew the bull and who saw him shortly after he was killed. From their evidence, which is of a very circumstantial character, there seems to be no doubt about the facts surrounding the death of the bull. He was struck at a point on the railroad near Gray's Creek about fifteen feet west of a public crossing, and about forty-five feet east of the east abutment of a railroad bridge which spans the creek. There was no fence or enclosure of any kind to keep him off the track at that point. After he was struck he dragged himself down to the bed of the creek where he died. He weighed about 1,300 pounds, and his heavy tracks on the grass indicated that prior to the accident he had been grazing near the bridge. His blood and hair left on the railroad track, and the car grease on his carcass plainly pointed to the cause

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of his decease, and the exact point on the track where he met his fate. The evidence tended to show that he was four or five years old, of the Durham and Duchess breed, and that he was worth from \$50 to \$75. The defendant introduced no evidence, and the jury returned a verdict assessing the damages at \$100, from which the defendant has appealed. A good many instructions were asked and given and refused, but which need not be considered in detail in disposing of the case.

I. It is objected that the complaint does not expressly negative the possibility of the animal having been killed at a public crossing or in the corporate limits of a town or city.

This objection is not well taken. It is alleged in the complaint that the bull was killed on the railroad, at "a certain point of uninclosed timber land," where the defendant had neglected to maintain fences and cattle-guards, to prevent stock from getting on the track; that it was at a point where the law required the defendant to maintain fences, etc., and that the bull was injured by reason of that neglect. I think the language sufficiently negatives the possibility of the point being on a public crossing. It is equally strong against the possibility of its being inside the corporate limits of a city.

Indeed the sufficiency of the petition is clearly within the rule laid down in the cases cited by defendant; (*Roland v. Railroad Co.*, 73 Mo. 619; *Bates v. Railroad Co.*, 74 Mo. 60;) because it is expressly and substantially averred that the bull was killed at a point which the law required the defendant to protect with a fence or cattle-guard, and that he entered upon the track at that point, and was killed by reason of the defendant's failure to maintain such fence and cattle-guards.

II. It is objected that the evidence in the record fails to show that the bull was killed in Jefferson township. This point is not well taken. The defendant at the trial objected to the sufficiency of the complaint in this respect.

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But the complaint shows that the killing took place in Jefferson township. The case was tried before a justice of that township, and after verdict it should be presumed that such a necessary fact was proved, otherwise the verdict could not have been rendered. The objection is not saved in the motion for a new trial, as it should have been to make it available here. Neither does it appear satisfactorily from the bill of exceptions that all the evidence was preserved. The jury was instructed that they could not find for the plaintiff, if the bull was not killed in Jefferson township. They must have had the evidence before them to render their verdict, and the bill of exceptions does not indicate positively that there was no such evidence.

III. The most serious objection raised is the giving of the following instruction for plaintiff: "If the jury find for the plaintiff, they will find the value of the bull when killed, and may give damage in double the value so found, and if they see fit give interest over and above the value." This instruction might do in an action of trover for the conversion of personal property. I allude to that part of it relating to interest. But it has been held that it will not apply to actions for negligence. *Meyer v. Railroad Co.*, 64 Mo. 543; *DeStieger v. Railroad Co.*, 73 Mo. 33. I do not think the defendant has been injured by it. It seems very clear from the evidence preserved and the verdict rendered that no interest was actually included in the finding of the jury. The highest estimate of the value of the bull given by the witnesses was \$75, and the lowest estimate \$50. The jury assessed the damages at \$100. Their verdict was as follows: "We, the jury, find for the plaintiff, and assess his damages at \$100." Now under the instruction of the court which left to the jury the right to double the damages, this verdict must be taken as giving the full measure of double damages called for in the complaint. *Seaton v. Railroad Co.*, 55 Mo. 416. Judgment was entered upon it as such, without doubling the amount. As it stands, it is conclusive against the plaintiff, and he has not ventured to

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disturb it. Assuming that the jury followed the evidence before them, it is evident that their verdict for \$100 was just double the minimum price or value of the bull, sworn to by the witnesses, which was \$50, and did not include any interest. I do not think the defendant has sustained any prejudice by this instruction about interest; and I am satisfied that a reversal of the case on this ground would ignore the merits of the controversy, and result in no substantial advantage to the defendant in another trial. In the trial before the magistrate the judgment was for \$200, double damages.

For these reasons I think the judgment should be affirmed. PHILIPS, C., concurs.

WINSLOW, C., dissented, on the ground that the instruction permitting the jury to find interest as a part of the damages was a fatal error, and was not cured by any of the considerations presented in the majority report. As to the other points he concurred.

NORTON, J., absent.

THE STATE v. OWEN, *Appellant.*

1. **Autrefois acquit: LARCENY.** A person tried upon an indictment drawn in two counts, the first charging larceny, the second embezzlement of the same property, was found guilty on the first count and not guilty as to the second, and judgment of discharge entered accordingly. For a fatal defect in the first count the judgment was arrested, and upon another indictment being found for larceny alone, the defendant interposed a plea of *autrefois acquit*. Held, not a good plea.
2. **The Court** declines to construe an obscure order of *nolle prosequi* found in the record as referring to the indictment on which the defendant was tried, it appearing that he had been before tried on an indictment which had, upon motion in arrest, been held bad.

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3. **Larceny.** An indictment held sufficient.
4. **Limitation to Criminal Prosecution.** When an indictment is quashed the time during which it was pending, is not to be computed as a part of the time of the limitation prescribed for the offense. R. S. 1879, § 1707.
5. **Instructions,** in a larceny case, approved.
6. **Practice, Criminal: DEFENDANT AS A WITNESS.** A defendant voluntarily testifying in his own behalf, is amenable to the usual rules governing the cross-examination of witnesses. R. S. 1879, § 1918. See *State v. Turner*, 76 Mo. 350; *State v. Porter*, 75 Mo. 171.
7. —— : HARMLESS ERROR IN RULING ON EVIDENCE. Where the defendant on the witness stand virtually admits his guilt, and besides it is clearly established by his confessions made out of court, and by other evidence, error in admitting further evidence will not warrant reversal of the judgment. HOUGH, C. J., and HENRY, J., dissent.
8. ——. Remarks of the prosecuting attorney in this case, if improper, do not require reversal of the judgment.

Appeal from Livingston Circuit Court.—Trial before JONAS J. CLARK, Esq., sitting as Special Judge.

AFFIRMED.

On the 4th day of February, 1880, the grand jury of Livingston county returned an indictment against defendant, charging him with the larceny of a mare, the property of one Edward A. Evans, on the 20th day of April, 1879. On the 28th day of September, 1881, defendant was tried and found guilty on this indictment, but on the 8th of the following October he was awarded a new trial. In January, 1882, there was a mistrial. Afterward, on the 28th of the same month, the grand jury returned a new indictment in two counts, the first charging larceny of the mare, the second embezzlement of her. On the 23rd day of May, 1882, defendant was tried and found guilty on the first count, and not guilty on the second count of this indictment. On the 25th of the same month a motion in arrest was sustained, and on the 1st day of June a new indictment was found. On the 3rd day of June an order was entered as follows: "A new indictment having been filed herein at this term,

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on verbal motion of the prosecuting attorney, it is ordered that a *nolle prosequi* be entered herein, and that defendant go hence discharged thereof and recover his costs in this behalf expended." The new indictment is as follows:

That on the 20th day of April, 1879, John E. Owen unlawfully and feloniously did then and there, one mare of the value of \$50, then and there being the property of Edward A. Evans, did take and carry away, against the peace and dignity of the State; and the said John E. Owen has been a fugitive from justice from the 20th day of April, 1879, to the 20th day of January, 1881, and was not an inhabitant of or usually resident within this State from the 20th day of April, 1879, to the 1st day of April, 1881, against the peace and dignity of the State. On this indictment defendant was tried.

Edward A. Evans, for the State, testified: Defendant came to my place about dark in April, 1879, looking for work. I was setting out trees; he helped me that evening. He remained at my house two days, then I hired him. I proposed to send him out to plow. He said he had clothes in Chillicothe, and would go and get them before going to work; said his reason for getting them was he wanted a change of clothing. I said: How do you expect to get to Chillicothe. He said I don't know; can't you let me have a horse. I said I don't know; I don't like to loan my horses. He said he would be back by three o'clock p. m. Then I let him have the horse in controversy. I never saw her afterward. About three months afterward I heard he was in the Richmond jail. I visited him there in his cell. Tears were running down his cheeks. He said he had taken my mare to Chariton, Iowa, and there sold her for \$25; took the money and got on a big spree; then went some miles further, stole a horse and took it to Nebraska, stayed there thirty days, stole another horse and brought it to Missouri and sold that one; he said he was then in jail for stealing another horse here. To the introduction of all the

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evidence relating to the other alleged thefts defendant objected without avail.

John T. Williams, for the State: Saw defendant at the jail in Livingston county; he told me he had got Evans' horse and sold her to a man in Chariton, Iowa.

J. D. Evans, for the State: Saw defendant in jail; asked him what defense he had; he said he had none; he hoped Evans would not be hard on him, and he would pay Evans when he got out.

David Hughes, for the State: Defendant said to me that he told Evans the truth at Richmond; that he felt bad about it, had sold the horse in Chariton, Iowa.

M. W. Butler: Evans came to me in 1879 looking for lost horse: we looked all over the city; could not hear anything of his animal, or of defendant being here at all.

N. H. Taft was express agent at Chillicothe in 1879; have examined books of American Express Company and find no account of any package received at Chillicothe for J. E. Owen; none came to my office; was also agent for Union Express Company; have not examined those books, as they were sent in; do not know what they contained and cannot tell whether defendant received package by that company or not.

Isaac Leeper: Received defendant from the penitentiary and have had him in my charge as jailor ever since; received him January 15th, 1881; he had just served a term for horse stealing when I got him.

G. W. Cranmer, for defendant: Heard E. A. Evans testify on the first trial of this case that defendant said he would walk to Chillicothe to get his clothes, and Evans said he told defendant to take the horse so as to get back sooner. Witness Evans contradicted this statement.

Defendant Owen: I told Evans I wanted to go to Chillicothe for my clothes. He said, How? I said, on foot. He said to take the horse so as to get back sooner. I came here from Jefferson City; had been there eighteen months in prison; was in jail in Richmond May 28th or

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29th, 1879; was arrested at Lawson, Missouri; have never been out of confinement since. At the time I got Evans' horse I rode her to Chillicothe; spent the money he had given me to get feed for mare and books for children for whisky; went to a saloon and got drunk.

The cross-examination of defendant was as follows: What did you do with the mare after you came to Chillicothe? Ans. I hitched her to the horse-rack on the south side of the square. What did you do with her after that? Ans. I rode her off. Did you not tell Evans in Richmond jail that you stayed north of Chillicothe with an old woman that night? Objected to; objection sustained. Did you not tell Evans that you would rather see any other man than him, when he came to see you? Objected to because defendant had made no statement in relation to conversation in Richmond jail. Objection sustained. Is this all you are willing to tell this jury about this case? Objected to as improper and only asked to prejudice the jury. Objection overruled. The question being then repeated, defendant's counsel again objected to the question and to its repetition. The court overruled the objection, but said that defendant had the right to refuse to answer.

R. Phillips, in rebuttal: Was on the jury at the first trial. Evans did not state he had offered defendant a horse to ride to Chillicothe so as to get back sooner; he stated substantially the same in that trial as in this.

David Hughes corroborated Phillips' testimony. This was all the evidence.

Whereupon the court, at the request of the State, gave the following instructions:

1. If the jury believe from the evidence, facts and circumstances proven in this case, beyond a reasonable doubt, that the defendant got the mare with intent to steal her and convert her to his own use, he is guilty of grand larceny, and in determining the question of intent the jury must look to all the evidence, facts and circumstances in the case.

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2. If the jury believe from all the facts and circumstances in proof, beyond any reasonable doubt, that defendant, in the month of April, 1879, at Livingston county, State of Missouri, borrowed of E. A. Evans, the mare mentioned in the indictment, and that said mare was the property of said Evans; that defendant never returned said mare, but converted her to his own use, and that at the time defendant so borrowed said mare he did so with the intent to steal her or permanently convert her to his own use, without the consent of her owner, they should find him guilty, and assess his punishment at not less than two nor more than seven years in the penitentiary.

3. The jury are the sole judges of the credibility of the witnesses and of the weight to be given to their evidence, and the jury are not bound to give to the testimony of any witness any other or greater weight than from all the circumstances in proof they may believe it entitled to.

4. Unless the jury believe from the evidence, beyond a reasonable doubt, that the defendant took, stole and carried away the mare mentioned in the indictment as charged therein, within three years next before the 28th day of January, 1882, they will find him not guilty, unless they further find that for some portion of that time he was absent from the State or was a fugitive from justice for the commission of the offense charged; in which case they will exclude the time defendant was so absent from the State or was a fugitive from justice for the said three years; but unless they be satisfied from the evidence that three full years have not elapsed between the commission of the offense and the 28th day of January, 1882, during which three years the defendant was in this State and not a fugitive from justice, they will find not guilty.

5. If the jury believe from all the facts and circumstances in proof, beyond a reasonable doubt, that the defendant got the mare described in the indictment with the intent to steal her, and did convert her to his own use, he is guilty of grand larceny, and in determining the question of intent

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the jury must look to all the facts and circumstances in proof.

6. Evidence consists as well of facts and circumstances as of direct proof, and proof may be as well made by facts and circumstances as by direct evidence.

7. Under the law drunkenness is no excuse or justification for crime.

8. A reasonable doubt to authorize an acquittal, should be a substantial doubt, and not a mere possibility of defendant's innocence of the crime with which he is charged.

9. By the statute of this State the defendant is a competent witness in his own behalf, but the fact that he is a witness testifying in his own behalf may be considered by the jury in determining the credibility of his testimony.

The court refused the following instructions prayed by the defendant:

5. The record of this cause shows that the defendant has been acquitted of the same acts and facts as charged in this indictment, and the jury must acquit the defendant.

6. The State has elected in this case to avoid the statute of limitations by declaring therein that the defendant was a fugitive from justice and a non-resident of this State, and are bound thereby, and unless the State has proven to the satisfaction of the jury, beyond a reasonable doubt, that defendant was a non-resident of this State or a fugitive from justice within three years before the 1st day of June, 1882, they will find defendant not guilty, and in making up their verdict they will count against the State all the time the defendant has been in custody.

7. The records read in evidence show that the defendant has been acquitted of embezzlement of the mare in controversy, and the jury must find the defendant not guilty if they believe from the evidence that the same acts and facts were introduced in evidence on said trial as in this.

8. If the jury find from the evidence that the defendant was in the State, in charge of the officers of the State

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for three years next before the 1st day of June, 1882, they will acquit him.

9. If the jury find from the evidence that the defendant was tried at the May term of the circuit court for the year 1882 on a charge of embezzlement of the mare in controversy in this case, and that the same facts were in issue upon the same evidence, they will acquit him.

The court gave the following instructions at the instance of defendant:

1. The jury cannot find the defendant guilty of embezzlement in this case; he has been acquitted of the same; and if the jury believe from the facts and circumstances in evidence that the defendant conceived the intent of stealing Evans' mare after he got possession of her from Evans, they will find him not guilty.

2. If the jury have any reasonable doubt as to whether the defendant conceived the intent to take the mare before or at the time he got possession of it, they will find him not guilty.

3. If the jury entertain a reasonable doubt as to whether the defendant first conceived the intent to steal the mare in controversy, after he got possession of it, they will find him not guilty.

Broaddus & Wait for appellant.

D. H. McIntyre, Attorney General, for the State.

I.

SHERWOOD, J.—The defendant was indicted in the Livingston circuit court. The indictment contained two counts, the first for larceny, in stealing a mare; the second for feloniously embezzling the same. Upon trial had, the defendant was found guilty on the first count, and not guilty as to the second, and judgment of discharge entered accordingly. For a fatal defect in the first count, the judgment was arrested, and upon another indictment being

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found for larceny alone, the defendant interposed his plea of *autrefois acquit*. The trial court very properly held that this plea could not prevail, the facts in the case, spread upon the record, not warranting or sustaining the plea in bar.

The statute provides that a person may be indicted for embezzlement and convicted of larceny, or *vice versa*; and in either case he is punished according to the fact as found by the verdict, whether the indictment charge embezzlement, or whether it charge larceny. R. S. 1879, § 1652. And the section cited further provides that "no person so tried for embezzlement or larceny as aforesaid, shall be liable to be afterward prosecuted for larceny or embezzlement upon the same facts." Had the indictment in this case contained but one count for either larceny or embezzlement, and had there been simply a verdict of acquittal, doubtless under the very terms of the statute no further prosecution could have been maintained for either of such offenses based "upon the same facts." But had the indictment contained but one count, and that for embezzlement, and had a trial been had on such count, and the defendant found guilty of larceny, and either expressly or else tacitly, not guilty of embezzlement; no one would question but that if the indictment were held bad on motion in arrest, the defendant could be indicted and tried on an indictment charging larceny alone. And the *status of the case* is not altered in this regard, because the pleader has seen fit to make his charge *bifurcate*, instead of making it in but one count, as allowed by the statute.

The verdict in this case on the former indictment must be taken as a whole, and not in separate parts. It clearly convicts the defendant of larceny, and acquits him of embezzlement, and when a plea of *autrefois acquit* is pleaded, based on such a verdict, it requires but an inspection of it to see that defendant did not go *acquit* of the larceny. *State v. Bowen*, 16 Kas. 475; 1 Bishop Crim. Prac., § 1005 a.

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II.

Although the entry announcing the fact of the *nolle prosequi* as to a former indictment, is somewhat obscure, yet we think it sufficiently plain what indictment was intended to be quashed; and the subsequent action of the court upon the indictment last found, shows what construction that court put upon its own entry of record. We will not intend, except upon the very clearest and most satisfactory record evidence of the fact, that a court would commit or sanction such an egregious blunder as to put a defendant upon his trial with no living indictment whereon to try him.

III.

The last indictment found was a valid and sufficient indictment, and charged that the larcenous act was feloniously done. There is no substantial objection to it.

IV.

No discussion is needed respecting the causes alleged in the last indictment, as to the absence of the defendant from the State, and as to his being a fugitive from justice, because the statute of limitations does not run where, as here, there were successive indictments pending against the defendant for the offense for which he was tried, and here the first indictment was found at the January term, 1880. R. S. 1879, § 1707; *State v. Duclos*, 35 Mo. 237; *State ex rel. v. Primm*, 61 Mo. 166; Bishop Stat. Crim., § 262.

V.

The instructions on both sides, taken as a whole, correctly declare the law on the subject of larceny, as applicable to the facts in evidence, and no valid objection can be urged against them. It may not be amiss, however, to say that nine instructions were given on behalf of the State, and three on the part of the defendant, making twelve in all, when the whole law of the case could have been cov-

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ered by one or at most by two well drawn and concise instructions.

VI.

We have no fault to find with the lower court in permitting the prosecuting attorney, after the defendant had testified in chief, to ask him, after cross-examining him to some extent: "Is this all you are willing to tell the jury about this case?" Such words were only equivalent to asking him: "Have you anything more to tell the jury?" The defendant volunteered to testify in his own behalf, and had thus testified, and was, therefore, amenable to the usual rules respecting other witnesses, and it was the privilege of the prosecuting attorney by all proper questions and methods to endeavor to elicit the truth.

VII.

Granting that there was error in permitting Evans, the owner of the mare, to relate to the jury the confessions of the defendant as to other similar crimes besides the one for which he was on trial, it is impossible to see how the defendant was in the slightest degree prejudiced thereby; because when on the witness stand he virtually admitted his guilt, admitted that he rode the mare off from Chillicothe where he had been permitted to go out of the kindness of Evans; and he did not pretend that he ever returned the mare, and there was abundant evidence that he had not, and besides, his own confessions to several other persons than Evans, show his guilt in the clearest possible light. In such circumstances it would be out of the question to reverse the judgment. *State v. Patterson*, 73 Mo. 695; *Rex v. Ball*, Russ. & Ry. 132; *State v. Emery*, 76 Mo. 348; *State v. Jennings*, 18 Mo. 435.

VIII.

The remarks of the circuit attorney, if improper, are disposed of by the observations made in the case of the *State v. Zumbunson*, decided at the last term, and by the

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case of the *State v. Jones*, ante, p. 278, and the *State v. Dickson*, decided at the present term. Therefore judgment affirmed. NORTON and RAY, JJ., concur; HOUGH, C. J., and HENRY, J., dissent.

HENRY, J., dissents on the ground that the opinion is in conflict with the *State v. Thomas*, ante, p. 327; *State v. Reavis*, 71 Mo. 419; *State v. Harrold*, 38 Mo. 496, and numerous other cases decided by this court, and not supported by the cases cited.

HOUGH, C. J., DISSENTING.—I am unable to find anything in this record which warrants the statement that the defendant virtually admitted his guilt at the trial. He was charged generally with larceny, and for the reasons given in the opinion of the majority could not be convicted of embezzlement. The indictment was drawn under section 1307, and not under section 1322. Edward A. Evans, the owner of the mare charged to have been stolen, testified that he loaned the mare in question to the defendant, at his request. The defendant testified that Evans tendered the use of the mare to him. The circuit court charged the jury in substance that unless they believed from the testimony that the defendant borrowed the mare with the intent to steal her or to permanently convert her to his own use, they would find him not guilty; and that if they had a reasonable doubt as to whether the defendant conceived the intent to steal the mare before or at the time he got possession of her, they would find him not guilty. It was admitted by the defendant, at the trial, that he rode the horse off, and he did not pretend that he had ever returned her, but neither the fact that he rode the horse off, nor the fact that he did not return her, nor both combined, constituted larceny under the instructions given by the trial court, and approved by this court in the opinion of the majority. The intent to steal the mare when he borrowed her, or accepted the loan of her, as the fact may be, was necessary to constitute the failure to return the mare, larceny under the indictment.

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in this case; and this intent was not admitted by the defendant at the trial, nor was it confessed by him to any one—certainly not directly, and I think not even by implication. The evidence of other similar offenses, introduced in violation of all law, doubtless settled that question with the jury.

In a note to section 218, 1 Greenleaf's Evidence, (13 Ed.) on the subject of confessions, it is said: "The evidence must be confined to his confessions in regard to the particular offense, of which he is indicted. If it relates to another and distinct crime it is inadmissible." *Reg. v. Butler*, 2 Car. & Ker. 221. *Vide* also, *State v. Goetz*, 34 Mo. 85; *State v. Harrold*, 38 Mo. 496; *State v. Daubert*, 42 Mo. 242; *State v. Reavis*, 71 Mo. 419; *State v. Greenwade*, 72 Mo. 298; *State v. Martin*, 74 Mo. 547; *State v. Underwood*, 75 Mo. 230; *State v. Turner*, 76 Mo. 351. The decision in *State v. Underwood*, *supra*, is correct, for the reason that in that case it was impossible to separate that portion of the conversation of the prisoner relating to the offense with which he was charged, from that portion of the conversation relating to another offense.

The truth of all extrajudicial confessions is a matter for the jury, and not for the court. When incompetent and irrelevant testimony, damaging to the defendant has been admitted, it is not for this court to usurp the province of the jury, and declare that excluding such incompetent testimony, the other evidence shows the defendant to be guilty. The case of *Reg. v. Ball*, Russ. & Ry., cited in the opinion of the majority, cannot be accepted as authority to the contrary. That decision was put expressly upon the ground that there could be no new trial in felony. Chambre, J., said: "If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought that as there could not be a new trial in felony, such a conviction ought not to be set aside because some other evidence had been given which ought not to have

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been received; but if the case, without such improper evidence, was not so clearly made out, and the improper evidence might be supposed to have had an effect on the mind of the jury, it would be otherwise." In the contingency last stated the admission of the illegal testimony would operate as an acquittal, under the law in force in England when that decision was rendered, or the pardon of the accused recommended. A different rule prevails in this country, and the case cited is, therefore, inapplicable.

I am of opinion that the judgment of the circuit court should be reversed and the cause remanded, in order that the defendant may be convicted by a jury on legal and competent testimony, before he is punished.

THE STATE v. WALKER, *Plaintiff in Error.*

1. **Murder: EVIDENCE, RES GESTAE.** The moment after a shot was fired resulting in death, defendant's right hand fell to his side and he struck out with his left at the deceased, when a bystander exclaimed "Don't strike him, for you have shot him now." Held, that such exclamation was admissible in evidence as part of the *res gestae*; that it was called out by, and was illustrative of, the affray while still in progress.
2. **— : EVIDENCE.** The failure to repel or deny a direct charge of crime is competent as presumptive evidence of guilt.
3. **— : RES GESTAE.** Upon a trial for homicide, the statement of another, when arrested for the crime, that he did not shoot the deceased, and the statements of others that it was the defendant who shot him, are not admissible in evidence as part of the *res gestae*, when not made during the affray.

Error to Stoddard Circuit Court.—Hon. R. P. OWEN, Judge.

REVERSED.

There was testimony that on the evening of the 4th day of November, 1880, the deceased with James and Henry

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Layton drove up to the drug store of P. G. Wilson in Bloomfield, where were assembled about eight or ten persons; that deceased and James Layton dismounted and went into the store, when deceased hollowed "Hurrah for Garfield," and some one hollowed "Hurrah for Hancock;" that deceased then said "I am a Garfield man, but I don't want this noise;" that defendant replied "I will hollow when and where I please;" that deceased said "I am here to keep order, and you will keep still or get out;" that defendant then said "I can get out of your d—d house, come out and I'll settle with you;" that deceased said "I do not want a fuss;" that defendant again hollowed "Hurrah for Garfield;" that deceased then came from behind the counter and said "Boys, help me to put these men out;" that defendant and James Layton were then forced out of the house; that shortly afterward a flash of a pistol was seen in the direction of the defendant, and deceased stepped back and said, "Boys, I'm shot;" that defendant then made a step or two toward deceased, and struck at him with his left hand, his right hand being dropped down and behind him, and said "Show me the d—n s— of a b— who put me out of the house;" that a bystander, named Cole, exclaimed "Don't strike him, for you have shot him now;" that Stephen Elliott was in an office, across the street from the drug store, when the shot was fired; that he started immediately to go to the place of the shooting and met a man coming from the drug store, whom he caught and held down; that this man said "Please let me go, I did not shoot him;" that about this time a wagon drove off; that Elliott heard voices saying "Walker shot the man," that he then let loose the man he had, and tried to catch the team; that the night was dark and rainy.

The instructions following were asked and given on behalf of the State:

1. The court instructs the jury that if they believe from the evidence that the defendant, Alfred Walker, did in Stoddard county and State of Missouri, on or about No-

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vember, 1880, willfully, deliberately, premeditatedly and with malice aforethought shoot and kill one Robert White in Stoddard county, Missouri, as charged in the indictment, they ought to find him guilty of murder in the first degree. Willfully, as here used, means intentionally and not accidentally. Deliberately, as used in this instruction, means done in a cool state of the blood, that is, not in a heat of passion caused by a lawful provocation. Premeditatedly means thought of beforehand, any length of time however short, even for a moment, length of time not being material. Malice signifies a condition of mind, an intention to kill, or do some great bodily harm to another without just cause or excuse. Aforethought means thought of beforehand for any length of time however short.

2. One who uses a pistol or other deadly weapon by which death is produced with a manifest design so to use it, with sufficient time to deliberate and fully form a conscious purpose to kill, without having at the time of killing reasonable cause to apprehend immediate danger of personal violence to himself, unless he so killed his enemy, is guilty of murder in the first degree. And if the jury believe from the evidence that defendant, Albert Walker, so shot and killed the deceased, willfully, deliberately, premeditatedly and of his malice aforethought, as those terms are defined in the first instruction, then they should find him guilty of murder in the first degree. And if the defendant had time to think before he so shot and killed the deceased and did intend for a moment, as well as for an hour or a day, then the killing is willful, deliberate and premeditated, and when human life is so taken with a pistol or other deadly weapon likely to produce death, then the malice requisite to constitute such killing murder will be presumed, unless the defendant is shown to have had reasonable cause, at the time he so shot and killed the deceased, to apprehend immediate danger of great personal injury from the deceased, and that there was then immediate danger of such design being accomplished.

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3. If the defendant shot and killed the deceased with a pistol, as defined by the first instruction, then there is no murder in the second degree in the case, but the offense, if proven, would be murder in the first degree, and the jury should so find.

4. Murder in the second degree is the wrongful killing of a human being, with premeditation and malice aforethought, but without deliberation. It is where the intent to kill is formed and executed in a heat of passion, executed the instant it is conceived, or before there has been time for the passion to subside; and if the jury are satisfied that the defendant did, with malice aforethought, in the manner and by the means charged in the indictment, willfully kill the deceased, Robert White, and the same was done without deliberation, then you ought to find the defendant guilty of murder in the second degree, and assess his punishment in the penitentiary for any period of time not less than ten years.

The instructions following were asked and given on behalf of the defendant:

1. Before the jury can find the defendant guilty of murder in the first degree, the State must prove beyond a reasonable doubt that the defendant shot and killed the deceased, Robert White, and that he did the killing deliberately, premeditatedly and of his malice aforethought; and unless the guilt of the accused has been so proven, there is no murder in the first degree, and the jury should so find.

2. Before the jury can find the defendant guilty of murder in the second degree, the State must prove beyond a reasonable doubt that the defendant shot and killed the deceased, and that the same was done with malice aforethought and premeditation.

4. Evidence is direct and circumstantial. Direct evidence is that which directly proves or disproves, if believed, the fact in issue. Circumstantial evidence is where the evidence tends to prove or disprove some collateral fact

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which, if found to be true, tends more or less to prove or disprove the controverted fact. And where it is attempted to establish the guilt of an accused person by circumstantial evidence only, the circumstances indicating guilt should not only be consistent with his guilt, but should be inconsistent with any other reasonable conclusion, and unless the jury find the circumstances establishing the guilt of the defendant to have been so proven, they will acquit.

5. The jury are the sole judges of the weight and value of the evidence, and, in deciding what credit is to be given to the statements of any person who has testified upon the trial, it will be proper to consider the intelligence of the witness, the interest he may feel, if any, the opportunities for observing and knowing the facts about which he speaks, the probabilities or improbabilities of his statements, with any other circumstance calculated to add to or detract from the credit due his testimony; and if satisfied that any witness has willfully testified falsely to any material fact, the jury will be at liberty to disregard the whole of the evidence of such witness or witnesses.

6. If the jury have a reasonable doubt of defendant's guilt, they ought to acquit, but a doubt to justify an acquittal on that ground should be a reasonable and substantial one arising out of the evidence, and not a mere possibility of his innocence.

7. To enable the State to a conviction in this cause, all the material facts must be proven substantially as charged in the indictment; and unless the jury find from the evidence that the prosecution has so proven the facts in this case, they ought to acquit.

8. Every person is presumed to be innocent, until his guilt is established by competent evidence.

The following instruction asked on behalf of defendant, was refused by the court:

3. The court instructs the jury that the defendant denies the killing of the deceased, but that although the jury might believe from the evidence that defendant shot

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and killed deceased, yet if they further believe that at the time of the killing, the defendant had reasonable grounds to believe that the deceased was about to take his life, or inflict upon him some serious personal injury, and that such danger was imminent, the defendant had the right to defend himself even to taking the life of deceased, although it might turn out afterward that such danger was only apparent to defendant and not real, and the jury will find the defendant not guilty. And in arriving at the fact as to whether defendant had reasonable grounds to apprehend such danger, the jury should take into consideration the facts that defendant was in a public house, that he was ordered away and expelled from the house by the deceased, and that the deceased then and there armed himself with a pistol.

The court, upon its own motion, gave the following instruction: The law of self-defense is the law of necessity, to which a party may have recourse under certain circumstances to prevent any reasonably apprehended great personal injury, which he may have reasonable grounds to believe is about to fall upon him; and if the jury believe that defendant had reasonable cause to apprehend a design on the part of deceased to kill him or to do him some great personal injury, and that there was reasonable cause to apprehend immediate danger of such design being carried out, and he shot and killed the deceased to prevent the accomplishment of such apprehended design, then the killing is justified upon the law of self-defense, and you should acquit. It is not necessary to this defense that the danger should have been actual or real, or that danger should have been impending and immediately about to fall, but if you believe that defendant had reasonable cause to believe these facts, and he shot under such circumstances as he believed to prevent such expected injury, then you should acquit; but before you acquit on the ground of self-defense, you ought to believe that defendant's cause of apprehension was reasonable. And whether the facts constituting such

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reasonable cause have been established before you by the evidence you are to determine; and unless the facts constituting such reasonable cause have been established before you by the evidence in this cause, you cannot acquit on the ground of self-defense.

S. M. Chapman for plaintiff in error.

D. H. McIntyre, Attorney General, for the State.

SHERWOOD, J.—Indictment for murder in the first degree; trial had and verdict for the second degree. The evidence was largely circumstantial, no witness testifying positively that the defendant fired the fatal shot, though there was much in the testimony pointing to him as the perpetrator of the murderous deed. There is great conflict of authority on the subject of what constitutes the *res gestae*. We feel satisfied that the remark or exclamation of Cole to Walker the moment after the shot was fired, and while the difficulty was still in progress, was thus admissible as illustrative of the act which generated or gave rise to the exclamatory remark of Cole.

Mr. Wharton, discussing this point, says: "The *res gestae* may, therefore, be defined as those circumstances which are the undesigned incident of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary

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individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. They are admissible, though hearsay, because in such cases, from the nature of things, it is the act that creates the hearsay, not the hearsay the act." 1 Wharton Ev., § 259, and cases cited.

It will be seen from the above quotation that in the view of some of the authorities at least, the exclamations made at the time of the occurrence, or immediately thereafter, and immediately and naturally connected therewith, form part of the *res gestae*, whether such exclamation proceed from one of the parties to the transaction, or from a bystander.

Thus it has been held that where the issue was whether the deceased had "died by his own hand," his death having been caused by a pistol shot, that the declaration of the occupant of an adjoining room to that of the deceased, made immediately after the report of the pistol was heard, to the landlord of the hotel, that the deceased had shot himself, was held part of the *res gestae*. *Newton v. Ins. Co.*, 2 Dill. 154. This case follows, as stated therein, as being within its reasons and principles, that of *Ins. Co. v. Mosley*, 8 Wall. 397, where the declarations were made by the husband within a few moments after the fall which resulted in his death; thus showing that in the opinion of the court, in the former case, no distinction is to be taken between the involuntary exclamation of a bystander, and those of a party directly interested or injured.

In a case in Massachusetts where a suit was brought against a steamboat for injuries to a passenger by the fall of a gangway leading from a wharf to the defendant's boat, evidence was admitted that men working at the gangway were warned, immediately before the accident, that the plank was unsafe. *Parker v. Steamboat Co.*, 109 Mass. 449. So, also, in Alabama, in a suit against a railroad

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company for injury to a passenger, where the plaintiff received injury in leaping from a car, while others who remained were unhurt, the declarations of such other persons giving their reasons for thus remaining, were held part of the *res gestae*. *Mobile R. R. Co. v. Ashcraft*, 48 Ala. 15. A similar rule in similar circumstances has been made in Illinois in respect to exclamations of passengers. *Galena R. R. Co. v. Fay*, 16 Ill. 558. For these reasons we must hold the declarations of Cole admissible.

But they are admissible also for the additional reason that the remark of Cole was made directly to Walker, but elicited no response. The remark of Cole charged Walker in direct and emphatic terms with the commission of the crime, and prompted him by the strongest considerations to speak out in defense of his innocence, if innocent he really was. It is so instinctively natural for one, directly charged with some great crime, to repel the charge with an immediate and direct denial, that failure to do so is regarded as a tacit confession or admission of guilt, and as competent evidence thereof. *People v. McCrea*, 32 Cal. 98, and cases cited; *State v. Reed*, 62 Mo. 129; *Martin v. State*, 39 Ala. 523.

But we are not inclined to regard the testimony of Elliott respecting the remark made by the man when arrested: *res gestae*, rested, and the remarks of other persons after the difficulty was over, as competent evidence, as part of the *res gestae*. *State v. Brown*, 64 Mo. 367. The language of the man arrested, that he did not shoot White, and the language of the others that "Walker shot the man," constitutes a narrative of a past occurrence not contemporaneous with the main fact under consideration, nor so connected therewith as to illustrate its character. 1 Greenleaf Ev., § 108; 1 Wharton Ev., § 261. We have discovered no other error in the case than the one first adverted to, but it is impossible to tell just how far such incompetent evidence may have influenced the jury. See *State v. Thomas, ante*, p. 327.

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Did the evidence in this case as overwhelmingly establish the guilt of the defendant as in the case of the *State v. Owen*, *ante* p. 367, and as in other cases there cited, we should not reverse the judgment because of the error commented on, but as it is, we must reverse the judgment and remand the cause; and when the cause goes back, attention should be paid to the venue, as it is doubtful whether that was satisfactorily proven.

NORTON, J., absent; RAY, J., concurs; HOUGH, C. J., and HENRY, J., concur in reversing the judgment, but not in the last observation in the foregoing opinion.